SUPREME COURT OF THE UNITED STATES.

No. 380.

EX PARTE, WILLIAM H. McCARDLE, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

INDEX.

	Original.	Print.
Petition	1	1
Order of court	4	2
Writ of habeas corpus	5	2
Return	6	3
Organization of military commission	7	3
Charges and specifications	12	6
Written statement (in lieu of plea)	25	12
Judgment	29	14
Appeal	29	14
Bond for costs	31	14
Clerk's certificate	33	15
Decision of district judge	34	16

Circuit Court of the United States, fifth judicial circuit.

1 UNITED STATES OF AMERICA, *Southern District of Mississippi:*

Be it remembered, that at a regular term of the Circuit Court of the United States, for the southern district of Mississippi, begun and held on the fourth Monday of November, in the year of our Lord eighteen hundred and sixty-seven, at Jackson, in said district, before the Honorable Robert A. Hill, district judge, on Monday the 11th day of November, A. D. 1867, being a day in the term aforesaid, William H. McCardle, by his attornies, presented in open court his petition, in writing which is as follows, viz:

To the honorable the Circuit Court of the United States for the southern district of Mississippi, Hon. Robert A. Hill, presiding:

The petition of William H. McCardle, a citizen of the county of Warren in said State, respectfully represents that he was, on Friday the 8th,, inst. placed under arrest and in close confinement in a military prison near the city of Vicksburg, in said county of Warren, by one General Alvin C. Gillem, acting under orders, as your petitioner is informed, of one Gen'l E. O. C. Ord, commanding the mili-
2 tary district, composed of the States of Mississippi and Arkansas. The said Maj. Gen'l E. O. C. Ord pretending to act under and by virtue of the authority of the United States, and in pretended conformity with three acts of the Congress of the United States hereinafter named, which said pretended authority your petitioner alleges to be null and void. Your petitioner further states that he is informed and believes that the charge or pretended charge on which said arrest was made is that petitioner has impeded reconstruction under the acts of Congress, commonly known as the reconstruction acts, and has thereby counselled resistance to the laws of the United States.

Petitioner states that he is a private citizen, unconnected with either the army or navy of the United States, and is not charged with any military offence, or with having aided or abetted rebellion against the government of the United States. That he is the editor of a daily journal published in said city of Vicksburg, called the Vicksburg Times, in the columns of which he has from time to time counselled his readers not to vote at the convention lately held by virtue of the acts of Congress aforesaid, or if they voted to vote against the call of a convention. He has never advised any resistance to the laws of the United States, except through the ballot box. He therefore states that his arrest and detention is in contravention of the Constitution and laws of the United States.

3 In consideration of the premises your petitioner prays the honorable court for a writ of habeas corpus ad subjiciendum, requiring the said Gen'l E. O. C. Ord, or said General Alvin C. Gillem, or both of them to have and produce the body of your petitioner before this hon. court; and that on return of said writ with his body as aforesaid, your petitioner be discharged from his illegal arrest and

imprisonment. And as in duty bound your petitioner will ever pray, &c.

W. L. SHARKEY.
MARSHALL & MILLER.
BROOKS & COOK,
Of Counsel for Prisoner.

Circuit Court of the United States, southern district of said State.

UNITED STATES OF AMERICA, *State of Mississippi:*

Personally appeared in open court, this the eleventh day of November, 1867, Walker Brooks, as counsel and agent for William H. McCardle, the petitioner in the foregoing petition, and made oath that the matters and things stated and set forth in said petition are true as he has been informed and verily believes.

WALKER BROOKS.

Sworn to and subscribed in open court, this the 11th day of November, 1867.

GEO. T. SWANN, *Clk.*

4 Whereupon the following order was then and there made, to wit:

In the matter of—406—William McCardle, ex parte.

On the motion of said William H. McCardle, by Messrs. W. L. Sharkey, Marshall & Miller, and Brooks & Cook, his attorneys, it is ordered that he have leave to file his petition for a writ of habeas corpus ad subjiciendum, now here offered in open court, which is accordingly now done, and upon argument thereof by counsel for the petitioner, the said petition is submitted to the court.

And, afterwards, to wit, on Tuesday, November 11th, A. D. 1867, being a day in the term aforesaid, the following order was entered therein, viz:

Ex parte—406—William H. McCardle, petition for writ of habeas corpus.

Ordered, that a writ of habeas corpus ad subjiciendum, directed to Alvin C. Gillem and E. O. C. Ord, be issued herein, according to the prayer of the petitioner, returnable on the 21st day of November, instant, before this court.

And thereupon, on the said 12th day of November, A. D. 1867, the following writ was issued, viz:

5 UNITED STATES OF AMERICA.
Southern District of Mississippi:

The President of the United States of America, to Alvin C. Gillem and E. O. C. Ord, or to any other person or persons, having the custody of William H. McCardle, greeting:

We command you, that you have the body of William H. McCardle, by you imprisoned and detained, as it is said, together with the

cause of such imprisonment and detention, before the judges of our Circuit Court, of the United States, at the Court-room in the city of Jackson, in said district, on the twenty-first day of November, instant, to do and receive what shall be then and there considered, concerning the said William H. McCardle.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court, of the United States, and the seal of said Circuit Court of the United States, hereto affixed at Jackson, in said district, this 12th day of November, in the year of our Lord eighteen hundred and sixty-seven.

[L. S.] GEO. T. SWANN, *Clerk.*

Upon which writ the said marshal made return in the following words and figures, to wit:

6 Executed personally on the within-named A. C. Gillem and by delivering him a true copy of this writ on the 13th day of November, A. D. 1867.

R. H. WINTER,
U. S. Marshal So. Dist. Miss.

And afterwards, to wit, on Thursday the 21st day of November, A. D. 1867, being a day in the term aforesaid, came the said Alvin C. Gillem, and made his return to said writ, in writing, as follows, to wit:

HEADQ'RS SUB. DIS., MISS.
VICKSBURG, MISS., *November 21st*, 1867.

Respectfully returned to the judges of the court, with the person of W. H. McCardle, who is held in my custody, in compliance with instructions from Maj. Gen'l E. O. C. Ord, com'mdg 4th mil. dis., on the charges herewith submitted, on which charge said McCardle has been arraigned before and is now being tried by a competent court, organized as provided by act of Congress of March 2d, 1867, and the acts supplementary thereto.

ALVIN C. GILLEM,
Br't Maj. Gen. U. S. A., Co. 'dg.

7 And with said return on the said 21st day of November, 1867, there was also filed the following, to wit:

Proceedings of military commission, convened by virtue of the following orders:

Copies of orders convening Military Commission.

Special Orders, No. 138:

HEADQUARTERS 4TH MILITARY DISTRICT,
(Mississippi and Arkansas,)
VICKSBURG MISS., *September* 21, 1867.

(Extract.)

* * * * * * * *

II. A military commission is hereby ordered to convene at this

headquarters at 10 o'clock a. m., on the 24th instant, or as soon thereafter as practicable, for the trial of Philip W. Gatewood, and such other prisoners as may be properly brought before it.

Detail for the Commission:

1. Brevet Colonel E. Swift, Surgeon U. S. Army.
2. Brevet Colonel J. G. Chandler, Major and Quartermaster U. S. Army.
3. Brevet Major Lynde Catlin, Captain 24th U. S. Infantry.
4. Captain Jasper Myers, U. S. Ordnance Department.
5. Brevet Captain John Williams, 1st Lieutenant 24th U. S. Infantry.

Second Lieutenant D. G. Swaim, 34th U. S. Infantry, Judge Advocate.

The commission will sit without regard to hours.

8 By command of Brevet Major General ORD.

O. D. GREENE,
Assistant Adjutant General.

Official:

(Signed) JOHN TYLER
1st Lieutenant 43d U. S. Infantry,
Acting Assistant Adjutant General.

Special Orders, No. 144.

HEADQUARTERS 4TH MILITARY DISTRICT,
(Mississippi and Arkansas,)
VICKSBURG, MISS., *September* 30, 1867.

(Extract.)

* * * * * * * *

III. Brevet Colonel Henry Goodfellow, Judge Advocate at these headquarters, is hereby detailed as Judge Advocate of the military commission convened in pursuance of paragraph II of Special Orders No. 138, current series, from these headquarters, and will relieve 2d Lieutenant D. G. Swaim, 34th U. S. Infantry, Assistant Judge Advocate, heretofore detailed on that duty.

By command of Brevet Major General ORD.

O. D. GREENE,
Assistant Adjutant General.

Official:

(Signed) JOHN TYLER,
1st Lieutenant 43d U. S. Infantry,
Acting Assistant Adjutant General.

Special Orders, No. 184.

HEADQUARTERS 4TH MILITARY DISTRICT,
(Mississippi and Arkansas,)
9 HOLLY SPRINGS MISS., *November* 16, 1867.

(Extract.)

* * * * * * * *

II. Second lieutenant D. G. Swaim, 34th U. S. Infantry, Assistant

Judge Advocate at these headquarters, is hereby detailed as Judge Advocate of the military commission convened in pursuance to paragraph II, of Special Orders No. 138, current series, from these headquarters, and will relieve Brevet Colonel Henry Goodfellow, Judge Advocate of the district, detailed on that duty in paragraph III, of Special Orders No. 144, current series, from these headquarters.

III. The military commission convened by Special Orders No. 138, paragraph II, current series from these headquarters, and of which Brevet Colonel E. Swift, Surgeon U. S. Army, is president, will reconvene at the headquarters of the sub-district of Mississippi, Vicksburg, Mississippi, on the 20th instant, or as soon thereafter as practicable, for the trial of Mr. W. H. McCardle, citizen, and such other prisoners as may be properly brought before it.

By command of Brevet Major General ORD,

O. D. GREENE.
Assistant Adjutant General.

Official:

(Signed) JOHN TYLER,
1st *Lieutenant* 43*d U. S. Infantry*,
Acting Assistant Adjutant General.

10 HEADQUARTERS 4TH MILITARY DISTRICT,
(Mississippi and Arkansas,)
HOLLY SPRINGS, MISS., *Nov.* 16, 1867.

Special Orders, No. 184.

(Extract.)

* * * *

IV. Brevet Major General G. Pennybacker, Colonel 34th U. S. Infantry, is hereby detailed as a member of the Military Commission instituted by Special Order No. 138, paragraph II, current series, from these Headquarters. * *

By command of Brevet Major General ORD:

O. D. GREENE,
Aisistant Adjutant General.

Official:

(Sig.) JOHN TYLER,
1st Lieutenant 43*d U. S. Infantry, Acting*
Assistant Adjutant General.

VICKSBURG, MISS., *November* 20*th*, 1867.
Eleven o'clock a. m.

The commission met pursuant to the foregoing orders.

Present, Bv'ts Maj. Gen'l G. Pennybacker, Col. 34th Inf't'y.
" Col. J. G. Chandler, Maj. and Quartermaster U. S. A.
" Major Lynde Catlin, Capt. 24th Inf't'y.
Capt. Jasper Myers, Ordnance Dept., U. S. A.
11 " Capt. John Williams, 1st Lieut. 34th Inf't'y.
2d Lieut. D. G. Swaim, 34th Inf't'y, Judge Advocate.

Absent, Bv't Col. E. Swift, Surgeon U. S. A.

The Judge Advocate stated that the absence of Colonel Swift was unknown.

The commission then proceeded to the trial of William H. McCardle, a citizen of the State of Mississippi, who was called before the commission, and having heard the orders convening the commission read, was asked if he had any objection to any of the members named in the detail, to which he replied in the negative. The accused having no objection to any of the members, the members of the commission were then severally duly sworn by the judge advocate, and the judge advocate was duly sworn by the presiding officer of the commission, all of which oaths were administered in presence of the accused.

The accused then asked permission to introduce Walker Brooks, H. H. Miller, esq'rs, as his counsel, which request was granted, and they appeared as counsel for the accused.

The accused, William H. McCardle, citizen, was then arraigned on the following charges and specifications:

12 *Charges and specifications preferred against William H. McCardle, a citizen of the State of Mississippi.*

Charge 1st. Disturbance of the public peace in violation of the law of Congress, passed March 2d, 1867, entitled an act to provide for the more efficient government of the rebel States, and the acts supplementary thereto.

Specification 1st. In this, that he, the said William H. McCardle, while editor of a newspaper of general circulation in the States of Mississippi and Arkansas, published at Vicksburg, Mississippi, under the name of the "Vicksburg Daily Times," did publish and allow to be published in said paper, the following article:

"Vicksburg Daily Times," W. H. McCardle, editor, Friday, November 1st, 1867.

"THE INSOLENCE AND DESPOTISM OF A SMALL SATRAP.—An incident occurred in this city, yesterday, which clearly exhibits the insolence and infamy of the vulgar despotism inaugurated in Mississippi by Brevet Maj. Gen'l Ord. Charles W. Vick killed a man a few days since, as is alleged, and as we are assured, in self defence. The committing magistrate refused to receive bail, and the prisoner was committed to jail. His counsel, the Hon. Thomas A. Marshall,
13 sued out a writ of habeas corpus, returnable before his Hon. Judge McGarr, of the Criminal Court. The case came on yesterday, and after a patient investigation the prisoner was admitted to bail in the sum of $5,000. The bond was promptly given and accepted, and the prisoner ordered to be discharged upon his bond to appear before the Criminal Court. General Ord removed, some time ago, the sheriff of Warren county, and appointed in his place a fellow by the name of Furlong, who was reputed to be a colonel or something else in the federal army, and this bogus sheriff—this minion of a vile minion—this petty deputy of a vulgar, paltry despot, when the order for the discharge of the prisoner was made, declined to release him until he should hear from Gen'l Gillem. After considering the matter for some time, this insolent deputy satrap con-

cluded to obey the order of Judge McGarr, and the prisoner was released. We suppose this fellow, Furlong, imagines that he and General Gillem are 'lords paramount' of Mississippi, and it is therefore useless to call in question his insolence, impudence, and insubordination. We have only this to say to Mr. Furlong, and that is, it is lucky for him that the editor of the Times does not wear the official robes of Judge McGarr. If we did, his refusal to release a prisoner ordered to be discharged, would have been followed by the prompt incarceration of the bogus sheriff. If Gen'l Gillem then thought
14 proper to release our prisoner by force of the bayonet, he could do so, but while wearing the judicial ermine, we would not allow it to be soiled or the power of the court to be placed at defiance by a subordinate and bogus official."

Which said article did encourage and invite defiance of, resistance to, and contempt for the official acts and authority of Charles E. Furlong, sheriff of Warren County, State of Mississippi, thereby creating a disturbance of the public peace.

This at Vicksburg, Mississippi, on or about the 1st day of November, 1867.

Specification 2nd. In this, that he, the said William H. McCardle, while editor of a newspaper of general circulation in the States of Mississippi and Arkansas, published at Vicksburg, Mississippi, under the name of the Vicksburg Daily Times, did publish, and allow to be ublished, in said paper, the following article:

"A STARTLING RUMOR.—There is a report that his excellency Gov. B. G. Humphreys, will be removed at an early day, and his place supplied by A. Burwell, esquire, provided he will accept. We give the rumor for what it is worth.—*Evening Telegraph.*

"We do not see anything so very startling in the report referred to by our evening cotemporary, remembering some of the outrages perpetrated by Gen'l Ord. We don't think our people would feel startled or surprised at anything he may do. We think they would
15 be intensely disgusted at the removal of Gov. Humphreys, that is, if past acts of insolence and despotism have not exhausted their entire stock of disgust. We have no idea, however, that Gen. Ord will remove Gov. Humphreys. If he does, we feel assured that Gov. H. understands his duty to the people of Mississippi; he will refuse to surrender his office, and the archives of the State now in his keeping, to Gen'l Ord's appointee. The next step for Gen'l Ord will be to use the bayonet in driving him from the executive office, and the next step for Gov. Humphreys to take will be to ascertain if Mississippi is Poland; and if so, if Gen. Ord is her autocrat. The question will then be decided by higher authority than Gov. Humphreys or satrap Ord."

Which said article did invite and encourage resistance to legal authority, thereby creating a disturbance of the public peace.

This at Vicksburg, Mississippi, on or about the 15th day of October, 1867.

Charge 2nd. Inciting insurrection, disorder, and violence, in violation of the law of Congress, passed March 2d, 1867, entitled "An act to provide for the more efficient government of the rebel States and the acts supplementary thereto."

Specification 1st. In this, that he, the said William H. McCardle, while editor of the "Vicksburg Daily Times," a newspaper of general circulation in the States of Arkansas and Mississippi, and published in the city of Vicksburg, State of Mississippi, did publish, and cause to be published in the said paper, the following article:

16

"THE INSOLENCE AND DESPOTISM OF A SMALL SATRAP.—An incident occurred here yesterday, which clearly exhibits the insolence and infamy of the vulgar despotism inaugurated in Mississippi by Bv't Major Gen'l Ord. Charles W. Vick killed a man a few days since, as is alleged, and, as we are assured, in self defence. The committing magistrate refused to receive bail, and the prisoner was committed to jail. His counsel, the Hon. Thomas A. Marshall, sued out a writ of habeas corpus, returnable before his Hon. Judge McGarr, of the Criminal Court. The case came up yesterday, and after a patient investigation, the prisoner was admitted to bail in the sum of $5,000. The bond was promptly given and accepted, and the prisoner ordered to be discharged upon his bond to appear before the Criminal Court. Gen'l Ord removed some time ago the sheriff of Warren County, and appointed in his place a fellow by the name of Furlong, who was reputed to be a colonel, or something else in the federal army, and this bogus sheriff, this minion of a vile minion, this petty deputy of a vulgar, paltry despot, when the order for the discharge of the prisoner was made, declined to release him until he should hear from Gen'l Gillem. After considering the matter for some time, this insolent deputy satrap concluded to obey the order of Judge McGarr, and the prisoner was released. We suppose this fellow Furlong imagines that he and Gen'l Gillem are 'lords paramount' of Mississippi, and it is, therefore, useless to call in question his insolence, impudence, and insubordination. We have only this to say to Mr. Furlong, and that is, it is lucky for him that the editor of the Times does not wear the official robes of Judge McGarr; if we did, his refusal to release a prisoner ordered to be discharged, would have been followed by the prompt incarceration of the bogus sheriff. If Gen'l Gillem then thought proper to release our prisoner by force of the bayonet he could do so, but while wearing the judicial ermine we would not allow it to be soiled, or the power of the court to be placed at defiance by a subordinate and bogus official."

17

Which said article was calculated to incite insurrection, disorder and violence in said States, by inviting and encouraging resistance to the lawfully constituted authorities.

This at Vicksburg, Mississippi, on or about the 1st day November, 1867.

Specification 2d. In this, that he, the said William H. McCardle, while editor of a newspaper of general circulation, in the States of Mississippi and Arkansas, published at Vicksburg, Mississippi, under the name of the Vicksburg Daily Times, did publish, and allow to be published, in said paper the following article:

18

"A STARTLING RUMOR.—There is a report that his excellency, Gov. B. G. Humphreys, will be removed at an early day, and his place supplied by A. Burwell, esquire, provided he will accept; we give the rumor for what it is worth.—*Evening telegraph.*

"We do not see anything so very startling in the report referred to by our evening cotemporary. Remembering some of the outrages perpetrated by Gen'l Ord, we don't think our people would feel startled or surprised at anything he may do. We think they would be intensely disgusted at the removal of Gov. Humphreys, that is, if past acts of insolence and despotism have not exhausted their entire stock of disgust. We have no idea, however, that Gen'l Ord will remove Gov. Humphreys; if he does, we feel assured that Gov. H. understands his duty to the people of Mississippi; he will refuse to surrender his office and the archives of the State, now in his keeping to Gen'l Ord's appointee. The next step for Gen'l Ord will be to use the bayonet in driving him from the executive office, and the next step for Governor Humphreys to take, will be to ascertain if Mississippi is Poland, and if so, if Gen'l Ord is her autocrat. The question will then be decided by a higher authority than Gov. Humphreys, or satrap Ord."

19

Which said article did invite and encourage resistance to legal authority.

This at Vicksburg, Mississippi, on or about the 15th day of October, 1867.

Charge 3d, Libel.

Specification 1st. In this, that heretofore, to wit, at Vicksburg, in Warren County, State of Mississippi, within the 4th military district, on or about the 2d day of October, 1867, at said Vicksburg, maliciously intending to injure, villify, and defame the character of Captain E. E. Platt, an officer of the United States Army, and to bring him into disgrace, contempt, and infamy, did publish in a newspaper of general circulation in said State, called the "Vicksburg Daily Times," a certain false, scandalous, and malicious libel against the said Captain E. E. Platt, in the following words and figures, to wit:

"A BUREAU BEAUTY.—There is a vulgar, spectacled brute in this city, one Platt by name, called Captain Platt, of the Freedman's Bureau, who is as precious a specimen of the genus blackguard as has ever come within the range of our observation. This fellow, Platt, upon the complaint of any negro, will send his bayonets and bring before him any white man in the city, and then bully, browbeat, and insult the unfortunate victim in his power. We have

20

been informed of some of the antics of this low-bred creature, Platt, which would disgrace any convict in the land. Knowing himself to be utterly unprincipled and incapable of telling the truth, this miserable hound takes great delight in insulting every white man against whom a negro may choose to lodge a complaint. We know one instance where he denounced a citizen as a liar and a thief because he denied the allegation of the negro, and made him pay what the negro claimed, or go to the guard-house. We are advised of other cases more infamous, if possible, than this one, and we propose to give Captain Platt an early ventilation. We advise Gen. Gillem, if he has any regard for the character of this bureau, to look after this creature, Platt. We can furnish him some items that might prove efficient in kicking him out of his office, that is, if disgraceful and brutal conduct is regarded as conduct unbecoming an officer and a gentleman, in the bureau."

Which said article was false and libellous, and tending to incite violence and a breach of the public peace.

21 Specification 2d. In this, that he, the said William H McCardle, while editor of a newspaper of general circulation in the States of Mississippi and Arkansas, published at Vicksburg, Mississippi, under the name of the "Vicksburg Daily Times," did publish, and allow to be published in said paper, the following article:

"THE INSOLENCE AND DESPOTISM OF A SMALL SATRAP."—An incident occurred in this city yesterday which clearly exhibits the insolence and infamy of the vulgar despotism inaugurated in Mississippi by Brevet Major Gen'l Ord. Charles W. Vick killed a man a few days since, as is alleged, and as we are assured, in self defence. The committing magistrate refused to receive bail and the prisoner was committed to jail. His counsel, the Hon. Thomas A. Marshall, sued out a writ of habeas corpus returnable before his Hon. Judge McGarr, of the Criminal Court. The case came on yesterday, and after a patient investigation the prisoner was admitted to bail in the sum of $5,000. The bond was promptly given and accepted and the prisoner ordered to be discharged upon his bond to appear before the Criminal Court. Gen'l Ord removed some time since the sheriff of Warren county and appointed in his place a fellow by the name of Furlong, who was reputed to be a colonel or something else in the federal army; and this bogus sheriff—this minion of a vile minion—this petty deputy of a vulgar paltry despot, when
22 the order for the discharge of the prisoner was made, declined to release him until he should hear from Gen'l Gillem! After considering the matter for some time, this insolent deputy satrap concluded to obey the order of judge McGarr, and the prisoner was released! We suppose this fellow, Furlong, imagines that he and Gen. Gillem are 'lords paramount' of Mississippi, and it is therefore useless to call in question his insolence, impudence and insubordination. We have only this to say to Mr. Furlong, and that is, it

is lucky for him, the editor of the Times, does not wear the official robes of judge McGarr; if we did, his refusal to release a prisoner ordered to be discharged, would have been followed by the prompt incarceration of the bogus sheriff. If Gen'l Gillem then thought proper to release our prisoner by force of the bayonet he could do so, but while wearing the judicial ermine, we would not allow it to be soiled, or the power of the court to be placed at defiance by a subordinate and bogus official."

Which said article was false and libellous and tending to incite violence and a breach of the public peace.

This at Vicksburg, Mississippi, on or about November 1st, 1867.

Specification 3rd. In this, that he, the said William H. McCardle, while editor of a newspaper of general circulation in the
23 States of Mississippi and Arkansas, published at Vicksburg, Mississippi, under the title of the "Vicksburg Daily Times," did publish and allow to be published in said paper the following article:

"THE SCOUNDRELISM OF SATRAPS.—We said a few days since that to be a military satrap, in the poor down-trodden South, was, ex necessitati rei, to be a scoundrel. As there is a good God in Heaven, we believe it; and we believe also that there is not a single shade of difference between Schofield, Sickles, Sheridan, Pope, and Ord, and that they are each and all infamous, cowardly, and abandoned villains, who, instead of wearing shoulder straps and ruling millions of people, should have their heads shaved, their ears cropped, their foreheads branded, and their precious persons lodged in a penitentiary."

Which said article was false and libellous, and tending to excite violence and a breach of the public peace.

This at Vicksburg, Mississippi, on or about the 6th day of November, 1867.

Charge 4th. Impeding the reconstruction of the southern States under the law of Congress passed March 2d, 1867, and the laws supplementary thereto.

24 Specification: In this, that he, the said William H. McCardle, while editor of a newspaper of general circulation in the States of Mississippi and Arkansas, published at Vicksburg, Mississippi, under the name of the "Vicksburg Daily Times," did publish, and allowed to be published in said paper, the following articles:

"STAY AWAY FROM THE POLLS.—We again urge every decent white man, every honorable gentleman of the Caucassian race, to avoid Gen'l Ord's election as he would avoid pestilence and a prison. As this advice does not apply to, and is not intended for the white sneaks of the loyal league, we shall expect to see these last-named despicable vermin out in all their strength. We should like to see the scoundrels in procession in daylight. We would engage Herrick to take their photographs. They would make an addition to the

rogues' gallery; and if our neighbor Clarke would only have them transferred to the Police Gazette, the transaction would ensure his fortune."

"THE IMMORTAL EIGHT.—We are gratified to be able to announce to the readers of the Times, that at the court-house yesterday, the only place open to the whole people, there were cast the votes of 'eight' white people only!! We tried to get the names of the interesting sneaks who voted, but failed, though the Times office was and is prepared to pay a dollar for the name of each voter. We shall publish the names of these voters if we can obtain them, and some day we shall; but if we do not, we shall with pride chronicle the fact that in the heroic city of Vicksburg, the gallant Sarogossa of the South, there were only eight cowards, dogs, and scoundrels of the Mygatt and McKee stripe."

Which said articles were calculated and intended to intimidate and prevent loyal citizens from voting.

This at Vicksburg, Mississippi, on or about the 6th day of November, 1867.

D. G. SWAIM,
L't 34th Inf'ty, Ass't Judge Advocate 4th Military Dist.

HEADQUARTERS 4TH MILITARY DIST.,
HOLLY SPRINGS, MISS., *Nov. 13th*, 1867.

Approved. Will be tried by military commission.
(Sign.) E. O. C. ORD,
Br. and B'v't M. Gen'l, Com'd'g.

To which charges and specifications the accused declined to plead orally, but submitted the following statement:

UNITED STATES OF AMERICA, }
vs. }
WM. H. MCCARDLE. }

Before a military commission, begun and held at Vicksburg, the 20th of Nov. 1867:

The defendant respectfully declines at present to plead or answer to the charges preferred against him, before this court, for the reason that he is informed that his case and the reasons for his arrest and detention, are now before the civil tribunals of the United States, viz: the Circuit Court of the United States, now in session at the city of Jackson, Miss., and that his said case is set for hearing by that tribunal, on to-morrow the 21st inst.

(Signed) WM. H. McCARDLE.

Which was read by his counsel, who also stated that the accused, by advice of counsel, refused to plead at this time, to the charges and specifications preferred against him. The commission was then cleared for deliberation; after some time the doors were opened and the judge advocate announced the decision of the commission to be,

that the judge advocate shall enter the plea of "not guilty" to the several charges and specifications preferred against the accused, and that the trial shall proceed.

The accused then submitted the following application *(which
27 is appended and marked exhibit 2.) for a postponement of this trial, pending the decision of the U. S. Dis't Court, on a writ of habeas corpus, which application was granted, whereupon the commission adjourned, to meet on the 23d inst., at 10 o'clock, a. m.

* Note by clerk.—The paper here referred to as "exhibit 2." was not filed in court.
GEO. T. SWANN, *Clerk.*

I certify that the above is a true copy of the records of the military commission, in this case.

D. G. SWAIM,
Lt. 34th Inf'ty, Judge Advocate.

Filed with return of Alvin C. Gillem, Brv't Maj. Gen. Com'dg, Nov. 21st, 1867.

GEO. T. SWANN, *Clerk.*

And upon the filling of said return, on the said 21st day of November, A. D. 1867, the following proceedings were had, to wit:

Ex parte—406—*William H. McCardle, on habeas corpus.*

This cause being called this day, and the marshal having returned the writ herein executed on A. C. Gillem, the said A. C. Gillem appeared in open court, and filed his return to said writ, and therewith surrendered to the court, the body of the petitioner, William H. McCardle, and the court thereupon ordered the petitioner into the custody of the marshal, and, by the court, the further hearing of this cause is postponed until to-morrow morning, 10 o'clock.
28 And afterwards, to wit, on Friday November 22d, being a day in the term aforesaid, the following proceedings were had, to wit:

Ex parte—406—*William H. McCardle, on habeas corpus.*

This case being called this day, came the petitioner in proper person, and by his attornies, moves the court to discharge the petitioner from further custody herein, because the facts set forth in the return to the writ awarded herein are not sufficient to warrant his detention, and the further hearing of said motion is postponed until to-morrow morning.

And afterwards, to wit, on Saturday the 23d day of November, A. D. 1867, being a day in the term aforesaid, the following proceedings were had, to wit:

Ex parte—406—*William H. McCardle, on habeas corpus.*

This cause being called this day, the consideration of the motion of the petitioner herein, for a discharge was resumed, and argument being heard thereon, on the part of the petitioner and of the respon-

dent, the said motion was submitted to the court; and thereupon came the said petitioner, William H. McCardle, and Charles Clark and William Porter, who severally acknowledged themselves
29 to be indebted to the United States of America, in the sum of five hundred dollars, each, to be levied of their goods and chattels, lands and tenements, but to be void if the said William H. McCardle, shall be and appear in his own proper person, in this court, from day to day, and from time to time, until he shall be thence discharged by the order of this court.

And afterwards, to wit, on Monday the 25th day of November, 1867, being a day in the term aforesaid, the following judgment was rendered herein, viz :

Exparte, William H. McCardle. No. 406. *On habeas corpus.*

This day came the petitioner in his proper person, and the court being now sufficiently advised in the premises, and being of opinion that the facts stated in the return to the writ, are sufficient to warrant the arrest and detention of the petitioner as therein stated. It is therefore considered by the court that the motion of the petitioner for his discharge, be and the same is hereby overruled, and that the petitioner be remanded to the custody of Maj. General A. C. Gillem, from which he came, and that he pay the costs in this behalf expended, to be taxed, &c.

And from said judgment the petitioner thereupon in open court, prayed an appeal to the Supreme Court of the Uniied States
30 which is allowed him, upon his entering into bond payable to the United States of America in the penalty of two hundred dollars, with one or more good and sufficient securities to be approved by this court or the clerk thereof, conditioned for the payment of such costs as may become due to the officers of the Supreme Court of the United States upon said appeal.

And on the motion of the petitioner to be admitted to bail, pending said appeal, it is ordered that he be admitted to bail upon his recognizance with one or more securities to be approved by this court, in the sum of one thousand dollars, each conditioned for his appearance in this court at the next term, and from day to day and from term to term thereof, to abide by and perform the final judgment and order of the Supreme Court of the United States herein.

And thereupon came the petitioner and William T. Withers, and Jones Hamilton, who severally acknowledged themselves indebted to the United States of America in the sum of one thousand dollars each, to be levied of their goods and chattels, lands and tenements, with condition to be void if the said William H. McCardle, shall be and personally appear in and before this court at the next term thereof, and shall continue therein from day to day and from term to term thereof,
to abide by and perform the judgment which the Supreme
31 Court of the United States shall render herein, otherwise to be and remain in full force.

And afterwards, to wit, on Tuesday the 26th day of November, A. D. 1867, being a day in the term aforesaid, the following proceedings were had, to wit:

Exparte—406—*William H. McCardle. On habeas corpus.*

This day came the petitioner into open court, and produced in open court his bond in the penalty of two thousand dollars, with S. McD. Vernon security, therein conditioned for payment of the costs which may become due to the officers of the Supreme Court of the United States upon his appeal herein, which bond, with the surety thereto, is approved by the court and ordered to be filed herein.

And thereupon the said bond was filed, which is in the following words and figures, to wit:

Know all men by these presents, that we, William McCardle and S. McD. Vernon, his surety, are held and firmly bound unto the United States of America, in the penal sum of two hundred dollars, for which payment, well and truly to be made we bind ourselves, our heirs, &c., jointly and severally, firmly by these presents. Given under our hands and seals this 26th day of November, in the year 1867.

32 The condition of the above obligation is this: whereas, the above-bound William H. McCardle obtained a writ of habeas corpus returnable before the Circuit Court of the United States for the southern district of Mississippi, held at Jackson, in November, 1867, commanding Maj. Gen'l E. O. C. Ord and Bv't. Brig. Gen'l A. C. Gillem, to have the body of the said McCardle before said court, upon an allegation that he was unlawfully imprisoned and detained in custody by them; and whereas, on the return to said writ the court entered judgment that the motion of the said McCardle to be discharged from custody, be overruled, and that he be returned by the marshal to the custody of said Gillem, the said McCardle prayed an appeal to the next term of the Supreme Court, which was granted upon his executing this bond. Now, if the said McCardle shall pay to the clerk of the Supreme Court of the United States, or such other party as may be entitled thereto, all costs that may be incurred by reason of said appeal, or that may be awarded against him, then this obligation to be void, otherwise it shall remain in full force.

W. H. McCARDLE. [SEAL.]
S. McD. VERNON. [SEAL.]

Endorsed: Filed in open court, and approved Nov. 26, 1867.
GEO. T. SWANN, *Cl'k.*

33 In the Circuit Court of the United States for the southern district of Mississippi.

I, George T. Swann, clerk of the said court, do hereby certify that the foregoing transcript, from page 1 to page 32, inclusive, contains

a full, true, and complete transcript of the process, proceedings, and final judgment of said court in the case therein stated, as the same remain of record in said court.

Given under my hand, with the seal of said court hereto affixed, at Jackson, in said district, this 30th day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and in the 92d year of the independence of the United States of America.

[SEAL.] GEO. T. SWANN, *Clerk.*

Memo. by clerk.

By the direction of the Hon. R. A. Hill, judge, I append hereto on the next page a printed copy of his opinion delivered in the foregoing case at the time of pronouncing his sentence therein.

GEO. T. SWANN, *Clk.*

34 *The decision of Judge Hill, of the U. S. District Court, on the application for writ of habeas corpus in the case of Colonel McCardle.*

In this cause the writ of habeas corpus, the great American magna charta of personal liberty, has been appealed for, granted, and obeyed. The writ and return present to the court questions of the deepest importance relative to the rights of the citizen, the supremacy and majesty of the Constitution and laws, and the peace and well-being of society.

The argument on both sides have been made by counsel whose experience and ability are equal to those of this or any other State, and have been conducted with that calmness and earnestness which questions of such vast importance demands. It now remains for me to pronounce the judgment of the court, according to the solemn convictions made upon my mind after a most careful consideration of the Constitution and laws, aided by the arguments.

The petition alleges that the petitioner has been arrested and is held in confinement by Maj. Gen. A. C. Gillem, commanding the U. S. forces in the State of Mississippi, in pursuance to an order issued by Maj. Gen. E. O. C. Ord, commanding the 4th military district, who claims authority for so doing under what is known as the Reconstruction Acts of Congress of the United States; that, as he is informed, the charges against him for which the arrest was made, are that he obstructed the enforcement of the said Reconstruction Acts, in this, that as editor of the Times, a newspaper published in the city of Vicksburg, he advised his readers not to vote in the late election, or, if they did, to vote against a convention; that his said arrest and imprisonment are in contravention of the Constitution and laws of the United States.

The return states that the petitioner was arrested, and is held in custody, upon charges preferred against him, and upon which he is now on trial before a tribunal of competent jurisdiction, a copy of which, with the proceedings had, are filed as part of the return.

Upon this return the petitioner, by his counsel, moves the court for his discharge for the reason that the grounds set forth in the return do not constitute sufficient cause for his arrest and imprisonment, which motion is resisted by respondent's counsel. Two questions are presented:

1st. Is the act of Congress, approved March 2, 1867, which by its terms authorizes the commanding general of this district to prevent disorder, to protect the citizens in their person and property, to arrest and punish disturbers of the peace and criminals, and, if in his opinion, it is necessary for that purpose to constitute military commissions or tribunals, so far as these powers are attempted to be conferred, is in contravention of and repugnant to the Constitution of the United States?

2nd. Does this act of Congress confer upon the commanding general the right to cause the petitioner to be arrested and put upon his trial before said military commission for the causes set forth in the answer and return?

The first one of these questions is one of vast importance to the country at large, as well as those immediately concerned. At the outset it may be well to state that this court has no power to pass judgment upon any political question arising upon any of these acts. The only jurisdiction which this, or any other judicial tribunal, possesses is to expound and enforce the laws. To this department of the government is entrusted the writ of habeas corpus by means of which the citizen, no matter what his position or condition may be, is protected from illegal arrest, imprisonmeat, and oppression, no matter by whom made, and so far as the citizens of this State are concerned, and the powers are given by law to this court, or either of the judges thereof, the power to grant this remedy is as ample and complete as in any State of the Union. These powers, however, are limited by law: 1st. To cases where it is necessary for the exercise of the jurisdiction of this court. 2nd. Where parties are held in custody by some law of the United States. 3d. Where the prisoner is not a citizen of the United States, and is illegally held under arrest, contrary to a treaty made between the United States and his own government. 4th. Where the prisoner is held in custody in contravention of the Constitution, laws, or treaties of the United States. It is under the last provision that the aid of this court is now invoked.

I may as well say now, that in all cases of offence against the acts of Congress, of which any court of the United States held in this State has jurisdiction, the court having the jurisdiction alone can try and punish the offender, and Congress has no power to confer such authority upon any other tribunal; certainly not upon any military commission, nor can such power be conferred upon any such tribunal for the violation of any State law in time of peace, in any State in which the people are living under a constitution, made by the citizens of the State, and laws made in persuance thereto, enforced by the officers elected and qualified in pursuance thereto, or in any of the Territories where Congress has provided proper civil tribunals.

When the constitution was made, it wisely provided as a means o protection to the citizen that he should only be tried by a fair and impartial jury; it was upon the presumption that in every State there was an independent judiciary established for the trial of such offenses under the constitution and laws of the State, hence it becomes important for us to ascertain if we can, whether or not there is now such a civil tribunal in the State of Mississippi.

Prior to the 9th of January, 1861, there was, but upon that day a body of men, claiming to act for all the people in the State, passed an ordinance by which they claimed to sever the State from all the ties which had before that time subsisted between the State and the federal Union, and claimed complete independance of the Union, and under no obligations to it, and denied to the Federal government any right to exercise auy jurisdiction in its borders. To this body, the executive, legislative, and most at least of the judicial officers of the State adhered, and soon after commenced in open hostility against the powers of the Federal government, and combining with similar bodies of other States, commenced and carried on for more than four years, one of the most gigantic and persistent wars known in modern history, until in April, 1865, this opposition was subdued by the force of arms of the Federal government. Admitting that all these proceedings were unauthorized by the Constitution of the United States; were contrary thereto, and consequently void,—and in this position I fully concur,—practically it only left the Constitution and laws as they existed before these proceedings commenced, as mere frame work, as a piece of machinery without any power to move it. There were no officers under them to execute any powers given by them. All the officers who had assumed to act after the commencement of the rebellion, were displaced by the conquering power, and the people of the State left without any practical civil government. It is true that the Constitution and laws might have been remitted to the hands of those elected and qualified, and who were exercising the functions of government when the attempted secession took place, subject to the changes which the war had made, chief of which was the destruction of slavery; but this no department of the government has assumed to do. The President of the United States, for the purpose of securing to the citizens the rights which had been declared their birth-right, the security of person and property, and the pursuit of happiness, by proclamation. appointed the Hon. W. L. Sharkey, one among the most distinguished jurists of the State, if not of the nation, provisional or military governor, and vested him so far as he had power so to do, with the powers of government necessary for the attainment of the desired objects, and in pursuance to which he by himself, and those appointed by him, did exercise the different powers of government, until the same were surrendered by him to the succeding provisional government. Tribunals of justice were established, taxes were levied and collected, rules of evidence were promulgated, unknown to any provisions of the constitution or laws before in force, but all of which were deemed to be necessary to the accomplishment of the security,

of public peace, and the attainment of public justice, to the security of life, property, and the pursuit of happiness, and which has since been declared legal by the highest judicial tribunal in the State; not that there was any direct constitutional authority therefor, but that it grew out of a public necessity.

The provisional governor, by proclamation, ordered an election to be held for delegates to a convention of the people of the State, to make such amendments to the constitution as were deemed necessary under the changed condition of the country. The qualifications of electors and delegates were prescribed, and which were unknown to the constitution and laws as before existing, but which were deemed necessary to guard against another attempt to disrupt the Union. The convention assembled and adopted what were deemed to be the necessary amendments. Under it, elections were held for all the officers, who immediately entered upon the discharge of their respective official functions.

The President, in his message to the first session of the 39th Congress, stated what had been done, and recommended the sanction of that department of the government in whom alone is vested political or legislative power.

Congress, however, refused to give it sanction, and set about devising some other plan to enable the citizens of the State to re-establish civil government, and to resume practical relations to the Union. Whether or not Congress has acted wisely or unwisely, is not a question which can be inquired into by this court. The local affairs of the State were mostly left in the hands of those so exercising the functions of office until the passage of the acts in question, and by which they were placed in the hands of the military commander assigned to the 4th district, and by which act it is declared that no legal civil government exists in this State; that the local government then existing should be deemed provisional only, and subject to the control of the Federal government; that the military commander for the purpose of executing the powers vested in him might remit the trial of offenders to the local tribunals, or if deemed necessary by him, for the arrest and punishment of disturbers of the peace and criminals, constitute military commissions or tribunals; and further, that he should take the prescribed steps for the election of delegates to a convention of the people of the State for the purpose of forming or amending the constitution, and the re-establishment of a constitutional civil government of the State, and a resumption of the exercise of all her rights as one of the co-ordinate States in the Union. The powers thus intended to be conferred upon the commander of the district, being similar in purpose, though differing in detail, from those conferred upon Governor Sharkey by the appointment of the President.

As has already been remarked, this Court has no control whatever over the political questions envolved in the one case or the other. The only question on this branch of the inquiry being whether or not there is now such a civil tribunal in the State to which those charged with offences against society can, under the Constitution of the

United States, demand a trial, and if not, whether or not Congress, in vesting the military commander with power to constitute military commissions to try such offenders, is in violation of the provisions of the Constitution.

It has already been said that the legality of the judicial tribunals constituted by the provisional governor has, by the highest judicial sanction of the State, been held as legal, not by means of any express provision of the constitution, but as growing out of the necessity of the condition of the State, and in this I concur. Such being the case, it is difficult to perceive any substantial distinction between that case and the present. In the former case, the power was conferred by the President upon a civilian; in this, it is conferred by Congress upon a commanding officer of the army. If it is the duty of the government of the United States in any one or all of its departments, to protect the citizens in their rights of person and property, and as a means of doing which, to provide for the punishment of disorder and crime, in the absence of a practical State government, then the choice of the means must be made by the power conferring such authority.

Being satisfied, first, that the government is bound under the Constitution to provide such security and that there is no judicial tribunal in the State not subject to the military commander, practically possessing such power, those offences not being cognizible in the Federal courts, I cannot come to that clear conviction of mind necessary under the decision made by the Supreme Court to pronounce this act repugnant to the Constitution and void. Had I that clear conviction of mind, it would be my duty so to declare it.

The remaining question to be considered is, do the specifications and charges stated in the return under the acts authorize the commanding general to cause the petitioner to be arrested and put upon his trial before the military commission?

It is insisted that the arrest was in violation of that provision of the Constitution which guarantees the freedom of speech and the press. I have no hesitancy in stating that the freedom of both are as fully guaranteed to the citizens of this as of any other State in the Union, to discuss and criticise any public measure and the official acts of those intrusted with either the making or execution of the laws, but this does not sanction any abuse made of either, and leaves speaker or publisher liable to any penalty prescribed by law for such abuse. It is admitted that the publications are libelous, and that under the laws of the State would subject the petitioner to indictment, and if found guilty, to punishment by fine and imprisonment; but it is insisted that this conviction can only be had by a jury, and the judgment pronounced by a proper judge under the Constitution and laws of the State; but we have seen that none such exist, except those equally subject to the control ef the commander of the district, and under the act it is left with him to choose the tribunal.

I am therefore constrained to come to the conclusion that the offence is one upon which he is subject to arrest and trial before the military tribunal. This is an offence against the public peace—one of the very objects which the commander is enjoined to presevre.

Any conservator of the peace, for the purpose of preventing a breach thereof, or to prevent the commission of a crime, may arrest the party. No one, however, can be punished for any but an offence against the laws, and the law must be in force before the act is committed. I take it that the laws affecting the peace of society, at least those in force before the attempted act of secession, are still the laws of the State, and I will further say that, in the absence of any law-making power in the State, the commander of the district, who we have seen to a certain extent, is entrusted with all the powers of government in the State, may for the attainments of the objects with which he is charged under the act by order first made public, declare that certain acts when committed shall be taken as violation of the law, and a penalty annex thereto.

Congress has not, however, as is contended, left the citizen to the mercy of the commander or any arbitrary oppression he may make; but has, in the first place, left to the citizen the power of the Federal courts and judges, through the writ of habeas corpus, a remedy against lawless oppression, and has by the act conferring the power prescribed its limits. The accused is secured a speedy and fair trial, and if convicted is not to be subject to cruel and unusual punishment. Therefore, where the accused is continued under arrest for an unreasonable time, or is subject to any other punishment than that prescribed by law, or of any other act of oppression, by those entrusted with the execution of the powers conferred, it will become the imperative duty of this court, or either of its judges, upon application, to grant the proper relief.

In giving a liberal construction to this act, (and by the act of July 17th, it is declared that such shall be done, for the attainment of its object,) I am satisfied that it was the intention of Congress that the accused should, as far as possible, have a fair, speedy, and impartial trial; if before the commission, that those who compose it shall be without prejudice or partiality—they being substituted for the jury; that the judge advocate shall see that the law is properly administered; that the trial shall be public; that the accused shall be furnished with the charges against him; that if required by him, the witnesses for the prosecution should confront him; that he shall have the right to counsel for his defence, and the attendance of witnesses for his defence, and to any defence he could have under the law before the courts. It is further provided that the record shall be examined and the judgment approved by the commander before the infliction of any punishment, and that it shall require the approval of the President before capital punishment is in inflicted. It may be supposed that those who passed the act, believed that domestic disturbances and crime could be best suppressed by tho commanding general and his subordinates, who might be presumed to be impartial and more efficient. Whether in this they were right or wrong it is not for this court to declare.

For the reasons stated, and others not deemed necessary now to state, the judgment of the court is, that the petitioner be remanded to the custody of Gen. A. G. Gillem, to answer the charges which are or may be preferred against him.

In the judgment given I may have erred. If so, it is an error of judgment, not of intention. I have endeavored to take the Constitution and law alone as my guide. I am gratified that the law has provided a direct appeal to the Supreme Court, which meets in the Capitol on Monday next, where any error I may have committed can be corrected. I desire, if the petitioner is at all dissatisfied with the judgment rendered, that he at once take his appeal. Should he do so, he will enter into recognizance, with one or more sureties, in the penalty of one thousand dollars, payable to the United States, conditioned for his appearance before this court at the next term, and from term to term to abide by such judgment as the Supreme Court may direct.

ROBERT A. HILL, *Judge.*

O

Supreme Court

OF THE UNITED STATES.

IN THE MATTER

OF

WILLIAM H. McCARDLE, EX PARTE,
APPELLANT.

BRIEF

OF DAVID DUDLEY FIELD,

FOR APPELLANT.

WASHINGTON:
INTELLIGENCER PRINTING HOUSE,
401 and 403 D Street, near 7th.
1868.

In the Supreme Court of the United States

IN THE MATTER OF WILLIAM H. McCARDLE, EX PARTE, APPELLANT.

Mr. Field's Brief for the Appellant.

The appellant, a citizen of Mississippi, was there arrested in October, 1867, and brought before a military commission, assuming to act under the authority of the United States, to be tried for publishing in a newspaper, of which he is editor, criticisms upon military officers, and advice to the electors not to vote or how to vote upon public questions. This citizen was not in the military service, nor impressed with a military character. And the question is, whether he was rightfully brought before that commission to answer for that act. In other words, according to the Constitution and laws of this country, could a military commission sitting in Mississippi, under federal authority, bring to trial and judgment a civilian of that State, for words published concerning federal military officers and the duty of the electors? The words may have been coarse and intemperate. That does not enter into the question. But it may be observed, in passing, that they were not coarser or more intemperate than other words daily uttered and published concerning the highest civil officers of the country—the President, the Judges of this Court, and Members of Congress—not only by the public press, but in public bodies which call themselves respectable.

The act of this military commission is defended in this Court by counsel deputed by the Secretary of War. The

defence rests upon certain acts of Congress, commonly known as the Military Reconstruction Acts.

There are three of them: one passed March 2, 1867; the second, a supplementary act, passed March 23, 1867, and the third, a further supplementary act, passed July 19, 1867. The first begins thus: "Whereas no legal State Governments or adequate protection for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State Governments can be legally established: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That said rebel States shall be divided into military districts, and made subject to the military authority of the United States as hereinafter provided;" and after providing for the assignment of an officer of the army to the command of each district, the act proceeds in the third section thus:

"*And be it further enacted,* That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence; to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take jurisdiction of, and to try offenders; he shall have power to organize military commissions or tribunals for that purpose; and all interference under color of State authority with the exercise of military authority under this act, shall be null and void."

The supplementary act of March 23, 1867, is not material to the present inquiry.

The first, second, and tenth sections of the supplementary act of July 19, 1867, are as follows:

SECTION 1. *Be it enacted by the Senate and House of Rep-*

resentatives of the United States of America in Congress assembled, That it is hereby declared to have been the true intent and meaning of the Act of the second day of March, one thousand eight hundred and sixty-seven, entitled "An Act to provide for the more efficient government of the rebel States," and of an Act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, were not legal State governments, and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.

SEC. 2. *And be it further enacted*, That the commander of any district named in said Act shall have power, subject to the disapproval of the General of the army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of of said Act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding, or exercising, or professing to hold or exercise any civil or military office or duty in such district, under any power, election, appointment or authority derived from, or granted by, or claimed under any so-called State or the government thereof, or any municipal or other division thereof; and upon such suspension or removal such commander, subject to the disapproval of the General as aforesaid, shall have power to provide, from time to time, for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person to perform the same, and to fill vacancies occasioned by death, resignation or otherwise.

SEC. 10. *And be it further enacted,* That no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.

The first and principal question hinges on the preamble to the original act, and the enactments which I have just quoted.

The argument against the appellant is this: The preamble is true, and the enactments are justified by the preamble. We deny both propositions. We say that the preamble is not true; but, if it were, that the conclusion does not follow.

It seems most convenient to reverse the order of the propositions, and to discuss the latter first; for if the conclusion does not follow from the premises, the Court need hardly trouble itself with them. I shall, however, not only resist the conclusion, but when I have done that, I shall dispute the premises.

Let me first ask attention to the proposition, that because "no legal State Government, or adequate protection for life or property, now exists" in the State of Mississippi, therefore that State can be placed by Congress under absolute and universal martial rule. Where is the authority of the Government of the Nation for taking upon itself the government of a State, however disordered and anarchical, and carrying on that government by the soldiery? We know that whatever power is possessed by Congress, or any other department of the Federal Government, is contained in a written Constitution. Within its few pages are comprised, either in express language or by necessary intendment, every power which it is *possible* for the Federal authorities of any kind to exercise under any circumstances. Show me, then, I say, the power to erect this military government. You cannot find it *expressed* in any one of the eighteen subdi-

visions of the eighth section of the first article—that section which contains the enumeration of the powers of Congress. If it is *implied* in any of them, tell me in which one. I cannot find it.

Turn then to the fourth section of the fourth article, that which declares that "the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature or the Executive, (when the Legislature cannot be convened,) against domestic violence."

Is a Military Government here sanctioned? Certainly it is not *expressed*. Is it *implied?* Supposing, for the sake of the argument, that the United States, uninvited by its legislative or executive, can go into a State for the purpose of repressing disorder, or violence, or of overthrowing an existing State Government on the ground that it is not republican, I deny that they can introduce a military government as the means to such an end. To avoid misapprehension, I carefully distinguish between the use of military power in aid of the civil, subordinate to it, and military government. The two systems are opposed to each other. In one case the civil power governs, in the other, the military. In one, the military power is the servant of the civil, in the other it is the master. My proposition is that a military government cannot be set up in the United States for any of the purposes mentioned, and the reason is this: *military government is prohibited by the Constitution.* Not disputing the proposition that Congress may pass all laws necessary or proper for carrying into effect any of the express powers conferred upon any department of the government, and that Congress is in general the judge both of the necessity and the means, the proposition is to be taken with this qualification or limitation: that is, that the means must not be such as are prohibited by other parts of the Constitution. A lawful end, an end expressly authorized by the Constitution, cannot be obtained by *prohibited means.*

This proposition should seem to be beyond dispute. Let us devote a few moments to its examination. The framers of the Government could not foresee all the exigences which might arise in the future, and therefore, after expressing the great ends for which the Government was formed, and the powers conferred upon it, they meant to leave the choice of the means to the discretion generally of Congress; but fearing that, in seasons of excitement and peril, measures might be adopted not compatible with civil liberty, or consistent with the rights of the States or of the people, various express prohibitions were inserted in the original instrument, and the number was greatly increased by the subsequent amendments. Thus, in the ninth section of the first article, the one immediately following the list of granted powers, is a series of prohibitions, seven in number, and among them that relating to the suspension of the privilege of habeas corpus, prohibiting it, "unless when in cases of rebellion or invasion the public safety may require it," and another relating to bills of attainder and *ex post facto* laws, prohibiting them altogether. Stopping for a moment to consider these clauses of the original instrument, before going into the amendments, we see clearly that, in the choice of means for carrying into execution any of its powers, Congress could not pass an act of attainder, or an *ex post facto* law, or, except in cases of rebellion or invasion, suspend the privilege of habeas corpus, however great might be the exigency or the peril, and though not only Congress, but the great majority of the country should think these means the most appropriate, the most sure, and the most speedy for meeting the exigency or avoiding the peril.

Passing then to the amendments, we find eleven articles, every one of which contains a prohibition of the use of particular means to obtain a permitted end. If the end was not permitted, the prohibition was unnecessary; it was only when the end was lawful and there was a choice of

means, that the prohibitions became effective. The manifest design was to prohibit the particular means enumerated in the amendments, however desirable might be the end. Among these prohibitions are the following: that Congress cannot abridge the freedom of speech or of the press; cannot infringe the right of the people to keep and bear arms; cannot subject any person not in the military service to answer for crime, but upon the previous action of a grand jury; cannot bring an accused person to trial but by a jury; and cannot deprive any person of life, liberty, or property, without due process of law. Therefore, in the choice of means for obtaining an end, however good, Congress cannot authorize the trial of any person, not impressed with a military character, for any crime whatever, except by means of a grand jury first accusing, and a trial jury afterwards deciding the accusation.

This prohibition is fatal to the military government of civilians wherever, whenever, and under whatever circumstances attempted. Such a government cannot exist without military courts, military arrests, and military trials. The military government set up in Mississippi could not exist a day without them.

Thence it follows, that even if Congress had authority to take upon itself the government of a State, this government could not be a military one; and for this reason, if there were no other, the whole scheme of these military reconstruction statutes fails, and the statutes themselves are unconstitutional and void; and if the statutes are void, all acts done under them are illegal.

It will be observed, that I have argued thus far without referring to the case of Milligan, decided by this Court more than a year ago. I might have saved myself labor by citing that case in the beginning. But, if I have stated the argument in part anew, I nevertheless rely upon the authority of that great judgment: a judgment which has given the

Court a new title to the respect of the world, and which will stand forever as one of the bulwarks of constitutional freedom. It is true that the judgment did not *in terms* embrace the rebel States, for the discussions at the bar, as well as the opinions from the bench, appear to have been carefully withdrawn from their disturbing influence; but it is nevertheless to be observed, that the principles declared are universal in their application. Among other things, it was adjudged that "the guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances;" and also that "neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus."

If, therefore, it were conceded that Congress could, in some possible circumstances, take upon itself the government of a State, it is certain that it could not govern by the army.

If it be said that Mississippi is not a State, and therefore the argument does not apply, I answer not only that Mississippi is a State, as I shall endeavor to show hereafter, but that if she be not a State, she is, neverless, within the limits of the United States, and that the prohibitions to which I have referred are as applicable and efficient in the territories, and in every part of the national domain, as in the State of New York. The guarantees of the Constitution extend over every foot of soil where the flag of the country floats, throughout all the States, and in this district, in the territories, in far-off Alaska. So it has been held in this Court. Whether, therefore, there be or be not a "legal State government or adequate protection for life or property" in Mississippi, Congress cannot intervene by the establish-

ment of a military government. The opinion of the Court in Dred Scott *vs.* Sandford, 19 How., 449, contains the following emphatic language:

"But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out, and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

"A reference to a few of the provisions of the Constitution will illustrate this proposition.

"For example: no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble and to petition the Gov-

ernment for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

"So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory, without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

"The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that owned by States. It is a total absence of power everywhere within the dominion of the United

States, and places the citizen of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government may attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local government established by its authority to violate the provisions of the Constitution."

In the dissenting opinions of Mr. Justice McLean, p. 542, and of Mr. Justice Curtis, p. 614, similar views on this point were expressed. In the opinion of Mr. Justice Nelson, no intimation was given that he dissented from these views.

This is the first part of my argument, and here, as I think, the whole argument might end: for if military government be a thing prohibited by the Constitution, we need go no further, nor trouble ourselves to enquire whether Congress has judged rightly in its reasons for intervention. It is the particular kind of intervention, that is to say, intervention by military power, that I have been objecting to; and if I have shown that to be inadmissible and unconstitutional, it matters little whether the reasons for intervention put forth in the preamble be sufficient or insufficient, or whether any other reasons have been, or could be, advanced for the interference of Congress in the government of Mississippi.

But I will now proceed a step further, and supposing, for the sake of the argument, that a military government is not a prohibited, but a rightful, constitutional means of intervention, I submit, that the preamble furnishes no reason for any kind of intervention whatever, and that, for two reasons: first, because it is not true, in a constitutional sense; and second, because, if true, it is not a constitutional reason for intervention.

It is not true in a consititutional sense. Of course, I am not going into any question of personal veracity, nor into questions of fact, except such as the court may take notice of judicially. The preamble asserts as facts, first, that there is no legal State government in Mississippi; and second, that there is no adequate protection for life or property. These two asserted facts are separable and separately stated. There may be a legal State government, though that government may not fulfil, and may not be able to fulfil, all its duties for the protection of life and property. It is most convenient to consider these assertions separately.

Was there, or was there not, on the 2d of March, 1867, a *legal State government* in Mississippi. This inquiry involves another, antecedent to everything else, which is, whether the declaration of Congress is conclusive upon this Court, or, in other words, whether you are at liberty, after this declaration, to make for yourselves inquiry on the subject, or whether you must accept the declaration as conclusive, whatever may be your own knowledge or information. This question may perhaps best be answered by supposing a case. Suppose an act of Congress passed to-morrow, with a similar preamble, concerning the State of Massachusetts, would you accept it as absolute verity? If it declared that, whereas no legal State government exists in Massachusetts, therefore it be made a military district, and subject to the military power of the United States, just as Mississippi is made subject by the act in question, and the commanding general of the district were to seize the ancient State House and Faneuil Hall, and the editors of the Boston newspapers were to be arrested and tried by military commissions for protesting against these violations, would you be obliged to hold that Massachusetts has no legal State government? Would you tell her, that though you do not see why she has not a legal State government, Congress has decided otherwise, and that is sufficient for you? I am supposing an extreme

case; but an extreme case is a good test of a universal principle. If, as a principle universal in its application, the declaration of Congress is conclusive upon the other departments of the Government, then in the case supposed of Massachusetts it would prevail. If the principle is not universal, then there are cases in which this Court could inquire for itself, notwithstanding the declaration of Congress. The true rule I apprehend to be this: the Court will take judicial notice of the fact of an existing government in every State of the Union: such a government will be presumed to be legal till it is shown to be illegal: the declaration of Congress may be one of the sources of evidence which enter into the case, but not the conclusive or the only one. If there be two rival governments in a State, Congress may have the right to decide between them, and certainly must decide which is to be represented in Congress, and that decision may be binding; but that is a very different thing from asserting that no government whatever exists, or that an existing government is *de facto*, and not *de jure*. The authority to *declare* a fact in only co-extensive with the right to *decide* it; or, in other words, the declaration has no force, except as a decision. This, therefore is the question: has Congress authority to decide, that *the existing government* of Massachusetts, or of any other State, is not a *legal* government? To this, there should seem to be but one answer. No power is given Congress to interfere with the government of the States, any more than power is given the States to interfere with the government of the United States, except in this one respect, that the United States shall guarantee to each State a republican form of government. But this preamble does not deny that Mississippi has a government, republican in form. That she has a government, is stated more that once in these Acts of Congress: it is there called an existing government; and while it is pronounced not to be *legal*, it is nowhere pronounced not to be *republican*.

Having shown, as I trust, that the declaration of Congress is not conclusive upon this Court in respect to the existence of a *legal* State government, little need be said respecting the conclusiveness of the declaration, that there is no adequate protection for life or property. It is not for Congress to decide whether New York fulfils her duty to her citizens of protection for their lives and property; and therefore the declaration of Congress on that subject, in respect to New York or Mississippi, has no force whatever.

Advancing, then, to the question of fact, as one of which this Court takes judicial notice, what do we see? We see a State government in Mississippi, established under a written Constitution, carried on by separate departments—legislative, executive and judicial—and continued in an unbroken line from her admission into the Union, until the passage of these military reconstruction acts; unbroken, I should have said, save in a single instance, when the military officers of the United States forbade the Legislature of the State to assemble, or her courts to hold their sessions. That break being caused by the federal forces, cannot be set up as a reason for federal interference. The series of statutes has been regularly continued through every year, and judicial decisions have been rendered from term to term, down to the present hour.

It is impossible to shut our eyes to the fact that, however censurable and criminal may have been the conduct of the legislatures of the rebel States during the rebellion, there were, nevertheless, established governments during all the time, carrying on their operations with regularity.

Whether there is "*adequate* protection for life and property" in the State of Mississippi I do not know, as I do not know what is meant by *adequate* protection. According to European ideas there is not "adequate protection for life or property" in some of the most loyal States of this Union. Should we, ourselves, say that there was adequate protection

for life or property in the anti-rent districts of New York for the ten years between 1840 and 1850? Is there now adequate protection for life or property in the mining districts of Pennsylvania? How is it in the new settlements? Is it meant by adequate protection that crime is punished with celerity, certainty, firmness and impartiality? If that be the measure of adequate protection, and Congress may interfere for the want of it, I fear they will have their hands full.

I have thus gone through these military statutes, and examined their provisions, together with the reasons on which they profess to be founded, and I submit that the reasons are not realities, and, if they were, that they would not justify the statutes.

But it is said that there are other reasons, not stated in the preamble, which justify them. Without stopping to inquire whether it be competent for the citizen to suggest reasons for an act of Congress, different from those which Congress itself has put forth, I will endeavor to answer all which I have heard mentioned, whether in political debates, or in the argument of the learned counsel on the other side.

Four reasons have been most insisted upon in political debate: one, that Congress is the sole judge of what is a republican form of government, and when it adjudges the government of a State not to be republican, it may force a military government upon it; the second, that the rebel States were conquered, and, being so, may be governed by the same military force which conquered them, so long as Congress sees fit to continue such government; the third, that by the rebellion the government and people of the Southern States forfeited all their rights; and the fourth, that Congress may now govern the rebel States, in the exercise of belligerent rights. Each of these reasons will be considered by itself, in the order in which I have stated them.

First. The United States are to guarantee to each State a republican form of government.

What is the true meaning of this provision? What is the guarantee of a republican form of government? Under color of this power, can the Federal authorities destroy existing State authorities? Such is not the natural import of the words. To guaranty is not to create, but to warrant the continuance of that which is already undertaken. This construction is the only one compatible with the public safety. To give the Federal Government the unlimited power of destroying any State government upon the allegation that it is not republican, is to give to the central authority a control over the local authorities greater than was ever dreamed of before, and is to make way for a consolidation fatal to the rights of the States and the liberties of the people.

The history and cotemporaneous exposition of this clause of the Constitution will show that it has no such meaning as the other side claim for it.

The subject was first brought before the Convention which framed the Constitution by Mr. Randolph, who proposed it in this form: "Resolved, that a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State." (2 Mad. Papers, 734.) Afterwards, "alterations having been made in the resolution, making it read: 'That a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States,' the whole was agreed to, *nem. con.*" (2 Mad. Papers, 843.)

On a subsequent day, after considerable debate, Mr. Wilson moved as a better expression of the idea, "that a republican form of government shall be guaranteed to each State; and that each State shall be protected against foreign and domestic violence." This seeming to be well received,

Mr. Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed, *nem. con.*" (2 Mad. Papers, 1139.) The language was afterwards changed to the form which it now bears in the Constitution.

In the 43d number of the Federalist, written by Mr. Hamilton, is the following exposition: "In a confederacy founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to *defend the system against aristocratic or monarchical* INNOVATIONS. The more intimate the nature of such an union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government, under which the compact was entered into, should be *substantially* maintained.

"But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature. "As the Confederate Republic of Germany," says Montesquieu, "consists of free cities and petty States, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland." "Greece was undone," he adds, "as soon as the King of Macedon obtained a seat among the Amphyctions." In the latter case, no doubt, the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State Governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general Government should not be needed, the provision for such an event will be a harmless

superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the General Government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions: a restriction which, it is presumed, will hardly be considered as a grievance."

The purpose of this guaranty of Republican Government was, therefore, to protect the States against "*aristocratic or monarchical innovations.*" Who would have thought that in less than eighty years this clause would be invoked as authority for forcing upon the States the most radical *innovations* in the opposite direction?

It is not for me in this place to say whether I think these innovations good or bad, nor is my opinion of any importance. If it depended upon me, and so far as I could constitutionally act, I would make every human being equal before the law. But I would not break the Constitution of my country for any innovations whatsoever. Without a written Constitution, republican government is impossible; and any instrument pretending to be a Constitution, is only such so far as it is inviolable. Our choice lies between maintaining against all opposers the inviolability of written Constitutions, or subsiding into monarchical governments.

It is said that Luther *ags'*. Borden, 7 How., 1, sanctions the claim of a right on the part of Congress to interfere in the internal government of a State greater than I have admitted: but that is a mistake. The acts complained of in that case were done under State authority, and the contest was between two rival governments, each claiming to be the lawful government of the State. The contesting government claimed that it had been adopted by the vote of the whole people, exercising for the first time the elective franchise; the government in possession having admitted to the exercise of the franchise only a part of the people, rested upon that part for its authority; and the judges were asked to decide that the contesting government was the true one, on the ground that it had received the sanction of the whole people. The Court, by Chief Justice Taney, decided, that "the question, which of the two opposing governments was the legitimate one, viz: the charter government, or the government established by the voluntary convention, had not heretofore been regarded as a judicial one in any of the State courts;" that "the courts of Rhode Island had decided in favor of the validity of the charter government, and the Courts of the United States adopted and followed the decisions of the State courts in questions which concern merely the Constitution and laws of the State," and then went on to say:

"Moreover the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion;

and, on the application of the legislature or of the executive, (when the legislature cannot be convened,) against domestic violence.

"Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper Constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the Courts.

"So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed in the power of a Court to decide when the contingency had happened, which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely: and by the act of February 28, 1795, provided that, "in case of an insurrection in any State, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive, when the legislature

cannot be convened, to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection."

"By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress."

And again:

"No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it."

Second. The argument from conquest is this: we have conquered the rebel States, and we can impose on them the will of the conquerer. But is this a sound argument? How have we conquered the rebel States? We have overcome the rebel armies. Has this operated to transfer the government from the conquered to the conquerer? Or, to state

the same idea in a different form, has it worked a transfer of the sovereignty from one sovereign to another; from the conquered sovereign to the conquering sovereign? Putting the question in this form answers it. The conquered State was sovereign before, in a qualified sense; the conquering States were sovereign before, also, in a qualified sense. The suppression, by the latter, of the rebel forces of the former, was entirely consistent with the relations which previously existed between the two sovereigns: neither the war nor the victory changed the double allegiance of the citizen; one to his State and the other to his Nation.

The laws of conquest have no application to a civil war. When a rebellion is subdued, the sovereign is restored to the exercise of his ancient rights. If a county in New York is declared to be in a state of insurrection, force is applied to put the insurection down; but when this is done, the law resumes its sway. The legal relations of the county to the State are not permanently changed, though their operations may have been suspended for the time being. By the laws of war between sovereign and independent States, when one has taken possession of the other, the will of the conqueror becomes the law, because his only relations to the conquered State are those of conqueror and master. If, however, there were antecedent relations, which the war has not broken, they are resumed the moment the war is over. The only inquiry in the present case is, whether the rebellion or the war has abolished, or changed the *legal relations* of the State to the Union. Now, as we maintain that no act of the Federal Government can exclude a State from the Union, so no act of the State can withdraw it from the Union. The war found it in the Union, subject to its laws; the war left it in the Union, subject to the same laws.

In barbarous times, the laws of war authorized the reduction to slavery of a conquered people. These laws have been softened under the influences of Christianity and civili-

zation, till now it is the settled public law of the Christian and civilized world, that the conquest of one nation by another makes no change in the property or the personal rights and relations of the conquered people. "The people change their allegiance," says Chief Justice Marshal, (7 Pet., 87, U. S. vs. Churchman,) "their relation to their ancient sovereign is dissolved, but their relation to each other and their rights of property remain undisturbed." One change only is effected, and that is, that one sovereign takes the place of the other. *In a civil war, sovereigns are not changed,* unless the rebellion is successful.

It is very true that the rebel States themselves renounced their allegiance to the nation, or rather they denied that they owed any such allegiance, and maintained that their relation to the Union was that merely of parties to a compact. We, however, denied their theory, and insisted that they owed allegiance which they could not renounce; and for the support of these opposite theories, each side took up arms. Now that we have won, it is not for us to deny the cause for which we fought. We are now striving to maintain the supremacy of the Constitution in the South, not so much for their sakes as for our own.

A little reflection will satisfy us that the opposite doctrine may lead to the most alarming consequences. Suppose that in Shay's rebellion the insurgents had got the better of the State government, and the troops of the United States had been brought in, and had suppressed the rebellion, would Congress, in that event, have been justified by the Constitution in imposing its own government upon Massachusetts? If the Federal Legislature may impose a government with one view, it may with another. It may impose one with a design to restrict the suffrage, as well as to extend it. Suppose hereafter a negro insurrection to occur in a Southern State, or even a peaceable change to be made in its constitution for the purpose of excluding a majority of the whites

from the government, and domestic violence and revolt thence to ensue, which results in Federal intervention and suppression, would Congress in that event be justified by the Constitution in assuming the government of the State and restricting the suffrage to the whites? Let us put this question. Suppose Mississippi, in a war between the United States and Great Britain, had been conquered by the latter, and then retaken by the United States, would this Government hold the State as conqueror or as federal sovereign under the Constitution? Most clearly the latter. The doctrine of *postliminy* rests on that foundation.

Let us look abroad and see what crimes have been committed under the plea of conquest. Ireland is a memorable example. "To the charge of arbitrary government in Ireland," says Goldwin Smith, "Strafford pleaded that the Irish were a conquered nation. They were a conquered nation, cries Pym. There cannot be a word more pregnant and fruitful in treason than that word is. There are few nations in the world that have not been conquered, and no doubt but the conqueror may give what law he pleases to those that are conquered; but if the succeeding acts and agreements do not limit and restrain that right, what people can be secure? England hath been conquered, and Wales hath been conquered, and by this reason will be in little better case than Ireland. *If the King, by the right of a conqueror, gives laws to his people, shall not the people, by the same reason, be restored to the right of the conquered, to recover their liberty if they can.*"

Hungary is another example. The House of Hapsburg was deposed by the Estates of the Kingdom. A bloody war followed, and the Estates were conquered. Then ensued a strife between the Emperor and his subjects, whether he was King of Hungary by the conquest, or King by the Constitution, and, after many years, and the terrible lesson of Sodowa, he was compelled to yield, and the Hungarians are now resting in the shelter of their ancient Constitution.

Third. A third reason given for the military government of the South is, that the rebel States and their people forfeited their rights by the rebellion. To this argument it might be answered, that our present concern is not what they deserve, but what we have a right to do. We are restrained by the Constitution which we have fought to maintain, and which we now assert for the sake of our own rights. Not confining ourselves to this answer, however, we insist that there is a fallacy in the assertion, that the rebel States and people have forfeited their rights by the rebellion. First, let us understand what act is claimed to have caused the forfeiture, the rebellion, or the war to maintain it. It can hardly be the act of throwing off their allegiance; that is, of renouncing the authority of the United States, which is supposed to cause the severance of the legal ties between the Union and the States, for the obvious reason that one party to a compact cannot disolve it by his own act, without the consent of the other. Is it then the war which is supposed to have produced these results? That can only happen because the levying of war is treason. In fact, the proposition is stated in its strongest form when it is stated that the *war* of the rebels was treason, and that traitors have no rights. But it is not true that traitors have no rights; they have all their rights until they are judicially condemned, or perhaps the better form of stating the proposition is, that they are not to be accounted traitors until they are convicted of treason. The Constitution has carefully defined treason to consist in levying war against the United States or adhering to their enemies, giving them aid and comfort, and has declared that no person shall be convicted of crime unless on the testimony of two witnesses to the same overt act, or upon confession in open court. So there can be neither treason nor penalty of treason, until after conviction; and Congress has not competency to convict, however great and manifest may be the crime.

There is another answer to the argument of forfeiture, and that is, that treason is a *personal* crime. There can be no treason of a State, though there may be of all the persons who compose it. Whatever may have been the misconduct of the citizens of Mississippi, even though every one of them were guilty, the State, the corporate body, did not, because it could not, commit the crime of treason.

Fourth. As to the doctrine of belligerent rights, what countenance does that give to the present government of the South by the army? There are no longer belligerent rights, because there are no more belligerents. The moment the war ceased, the laws of war ceased also.

This should seem to be a sufficient reason, but as the argument is much insisted on, I will follow it further. The question of belligerency and belligerent rights received great attention in the prize cases, where the Court laid down certain fundamental propositions. One of them, relating to the fact of a civil war existing, was this: "The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, *civil war exists*, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.'" (2 Black, 667.)

Applying this rule to the present case, it follows that civil war can no longer be recognized as existing in Mississippi, because the courts are open. Therefore, whether, during the war, the just exercise of belligerent rights would have authorized the Federal Government to take into its hands the entire government of that State, there is no warrant for any such exercise now.

Another proposition in that case was, that the courts will take judicial notice of the beginning and progress of the civil war. Of course, for the same reason, they will take judicial notice of its end.

The court says: "By the Constitution, Congress alone has the power to declare a national or foreign war. *It cannot declare war against a State*, or any number of States, by virtue of any clause in the Constitution. *The Constitution confers on the President the whole executive power.* He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. *He has no power to initiate or declare a war either against a foreign nation or a domestic State.*"

A further proposition of that case was, that by exercising belligerent rights the United States did not lose those which were sovereign. If their sovereign rights remained, their duties, as sovereign, remained also. The exercise of belligerent rights was in fact for the purpose of regaining the complete enjoyment of their sovereign rights, and for no other purpose.

The language of the Court was, "The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other."

It is also to be observed, that belligerent rights are to be exercised by the Executive, and not by Congress. In the present instance, the Executive exercises, and attempts to exercise, none against the State of Mississippi, or any of her people. Indeed, he disclaims any such authority; these military acts were passed over his veto; and if the argument from belligerency should prevail, we should have the extraordinary spectacle of the Legislature exercising an executive function, without the consent and against the protest of the Executive.

It is further to be observed, that while the war lasted,

their belligerent rights did not authorize the United States to carry on the entire government of Mississippi. What, indeed, might they do while the war was raging? They might govern their own armies and subdue the armies of the rebels. As soon as that was done, or as fast as they advanced, they could proceed to organize their own displaced government in its former estate, open the Federal Courts, run the Federal mails, collect the Federal revenue; in short, do all that they could do before. But might they not do something more? That depends upon their rights and their duties under the Constitution. This government is a limited one, and its rights and duties are defined and limited by the Constitution, and if you cannot find there the warrant for its action, it cannot act at all. If a State of this Union should fall into great disorder, so that her finances should become ruinous, her treasury bankrupt, her roads infested by robbers, property and person be insecure, with an impotent executive, a babbling legislature, and a venal judiciary, could Congress step in and take the government of that State into its own hands? I can perceive no authority for their doing so; and if authority be necessary, it must be sought by an amendment of the Constitution. It is as clear as noonday that the theory of our present Constitution is, that the States shall organize themselves, and that Congress has nothing to do with it; except that if in such organization the States should introduce aristocratic or monarchical innovations, it might then interfere to insist upon their going back to their republican forms.

But it may be asked, cannot the Federal army, which goes into a State to suppress a rebellion, govern the country as it advances into it: I answer, as a similar question was answered in Milligan's case, "*necessitas, quod cogit, defendit.*" The advancing and occupying army must govern itself by the laws of war; it must keep the peace within its own lines, and for that purpose it must govern the people within

them, so far, and so far only, as ordinary civil government is impossible. For example, when the City of New Orleans was taken by the Federal forces, all the Federal laws applicable to the port and district went again into operation; but if there were no State officers competent to administer or execute the State laws, the commanding officer of the occupying forces must, of necessity, for the safety of his own army, as well as of the society within his lines, preserve order, and might make regulations for that purpose. This, I suppose, is the rule, and the whole of it.

Even this power ceases with the necessity of its exercise. The moment the military occupation (*occupatio bellica*) ceases, that moment the right to govern even within the narrow limits which I have explained, ceases also. Is there no period, then, after the cessation of hostilities during which the military occupation may continue? No intermediate state between the state of war and the state of peace? no interval after hostilities, and before the reëstablishment of civil government? To this question, as applicable to this case, I answer:

I. The occupying forces must have reasonable time to retire with their war material; and so long as they necessarily remain for that purpose, so long the reason of the rule applies, and therefore the rule itself; but they have no right to remain longer.

II. The *federal* civil government is of course capable of being put into full vigor as soon as the rebellion is suppressed. To guard the federal property, to protect the federal officers, to assist in the execution of federal process, the troops may always remain, in peace as in war.

III. If no State authorities whatever are left, and the people are absolutely without magistrates or officers of any kind, so that the withdrawal of the federal troops would be the signal of a general massacre or pillage, then the troops may remain, just as any other body of men may re-

main, in the interest of humanity, and upon principles of common or universal law, to prevent the commission of crime or violent injury to person or property. If the captain of an American frigate in a Chinese port finds a condition of anarchy and general pillage on shore, I suppose he may land the ship's company to stop the violence and rapine; but that does not imply any right in the captain to govern the town.

IV. If there be an existing State government *de facto* or *de jure*, the question cannot arise. There was such a government in Mississippi when the war closed. The retirement of the federal troops would have left the State, impoverished and exhausted no doubt, but not without a government.

If this Court is not bound by the declaration of Congress, that there are no legal State governments in the South, no more is it bound by the declaration of the President, that there were none when the war closed. Indeed, if I might venture the suggestion, which I do with great diffidence, the true course at the close of the war was to consider the governments then in existence as governments *de facto*, which could become governments *de jure* on taking the oath of fidelity to the Federal Constitution. Congress would not have felt itself obliged to admit any but loyal representatives to seats. This suggestion is not at all important to my argument, but candor obliges me to say, that I think the source of all the difficulty that has since been encountered, was in the departure from the true theory of our Government when the rebel army surrendered. Indeed, I cannot help thinking, that the general form of capitulation arranged by General Sherman, without reference to its details, was constitutional and statesmanlike.

Having thus shown that the occupation of a State by a conquering army did not affect any such change in the rights and duties of the people, as is supposed in the defendants'

argument, even if the two contending parties were regarded as independent States, and the war what is called by jurists a public war, I might add as an additional and conclusive argument of itself, that in a civil war there can be, strictly speaking, no such occupation—*occupatio bellica*. "In a civil war," says Phillimore, "there could be no *occupatio*." (3 Phill. Int. Law, 704.) "A civil war," says Grotius, "is not of the same kind, concerning which this law of nations was instituted." (Grotius L. 3, C. 8, § iv.)

Halleck, in his work on International Law, p. 806, § 29, says:

"In the civil war between Cæsar and Pompey, the former remitted to the city of Dyrrachium the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists, who have commented on this transaction, agree that the debt was not legally discharged: first, because in a civil war there could be, properly speaking, no *occupation*; and second, because it was a private and not a public debt."

In a late case in North Carolina, where it was attempted to apply the principles of the "*occupatio bellica*" to the sequestration, by acts of the insurgent State, of a debt due to a citizen of a loyal State, the Court rejected the defence, and said: "These acts did not effect, *even for a moment*, the separation of North Carolina from the Union, any more than the action of an individual who commits grave offences against the State by resisting its officers and defying its authority, can separate him from the State. Such acts may subject the offender even to outlawry, but can discharge him from no duty, nor relieve him from any responsibility."

After this opinion of the Chief Justice, let me read from the opinion of Mr. Justice Sprague, in the case of the Amy Warwick, (24 Law Rep., 498.) "An objection to the prize decisions of the district courts has arisen from an apprehension of radical consequences. It has been supposed that if the Government have the rights of a belligerent, then, after

the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error; a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterwards on the ocean, even where peace could not have been known, is unauthorized, and property so taken is not prize of war, and must be restored. (Wheat. Elements of International Law, 619.) Belligerent rights cannot be exercised when there are no belligerents. Titles to property or to political jurisdiction, acquired during the war by the exercise of belligerent rights, may indeed survive the war. The holder of such title may permanently exercise during peace all the rights which appertain to his title; but they must be rights only of proprietorship or sovereignty: they cannot be belligerent. Conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation by force of arms expels or overthrows the enemy and suppresses hostilities, it acquires no new title, but merely regains the possession of which it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights. (Wheat., 616.) During the war of 1812 the British took possession of Castine, and held exclusive and unlimited control over it as conquered territory. So complete was the alienation that the Supreme Court held that goods imported into it were not brought into the United States, so as to be subject to import duties (U. S. *a.* Rice, 4 Wheat., 246.) Castine was restored to us under the treaty of peace; but it was never supposed that the United States acquired a new title by the

treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, no one would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all prë-xisting political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any State, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the Constitution. In a civil war, the military power is called in only to maintain the Government in the execise of its legitimate civil authority. No success can extend the power of any department beyond the limits prescribed by the organic law. That would be not to maintain the Constitution, but to subvert it. Any act of Congress which would annul the rights of any State under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a State have passed such ordinances can make no difference. They are legal nullities; and it is because they are so, that war is waged to maintain the Government. The war is justified only on the ground of their total invalidity. It is hardly necessary to remark, that I do not mean that the restoration of peace will preclude the Government from enforcing any municipal law, or from punishing any offence against previous standing laws."

I am now ready to examine the terms of the particular propositions which have been stated by the other side in support of their case. There are six of them, thus expressed:

1. "That Mississippi has no State government which is entitled to be recognized by the United States as a 'State'

of this Union; and that this has been determined by the political departments of this Government."

2. "That the decision so made is binding and conclusive upon this Court, notwithstanding the judges may think the decision erroneous."

3. "That it is the undoubted right and duty of the United States to aid the loyal people of Mississippi in establishing a republican State government for that State, and that the United States is now engaged in the performance of that constitutional duty."

4. "That the grant of power to the United States to 'guarantee a republican form of government' to the States of the Union, not being restricted by the Constitution, as to the means which may be employed to execute the power, Congress is the exclusive judge of what means are necessary in a given case."

5. "That the act in question, with the act supplemental thereto, regarded as embodying the means adopted by Congress for this purpose, violates no provision of the Constitution of the United States."

6. "That inasmuch as Congress entered upon the prosecution of the war against the rebel States, in 1861, this Court is and will be bound judicially to recognize war as still existing, until Congress shall declare peace to be restored, or shall cease to exercise any belligerent right towards those States."

The fifth of these propositions is merely a supposed conclusion from other propositions, and need not be separately considered. The fourth is met by what I have already said about the use of prohibited means to secure an end, however constitutional and desirable that end might be. I have shown that military government is prohibited. Therefore, even if the first three and the sixth propositions were all conceded, these military reconstruction acts could not be defended.

The third proposition has already been sufficiently answered. The first two and the sixth alone remain to deserve particular attention; and even in respect to the sixth, I have already shown that belligerent rights cannot continue to be exercised unless the war can be prolonged by a fiction.

The discussion of these three propositions; that is, the first, second, and sixth, may be separated into four divisions:

1. Is Mississippi, in fact and in law, a State of the Union, having regard only to the conditions of rebellion and war, without reference to the declaration of the Legislative and Executive Departments of the Government upon the question? In other words, did the rebellion, or the war, or both, put Mississippi, *as a State*, out of the Union?

2. Is war, in fact and in law, still subsisting between the United States on one side, and the State, or State government, or people of Mississippi, on the other side, without reference to the declaration of the Legislative and Executive Departments of the Government upon the question?

3. What has been the declaration of the Legislative and Executive Departments upon these two questions?

4. What is the legal effect of such declaration?

First. Did the rebellion, or the war, or both, put Mississippi, *as a State*, out of the Union?

This raises what I may call the *metaphysical* question. Horne Tooke protested that he had been the victim of a preposition. If the Southern States are to be held by this military government, after every hostile army has been surrendered, and every unfriendly hand has been lowered, they will be the victims of metaphysics, imported into politics.

Mississippi was a State of the Union once. When did she cease to be such? Was it when she adopted the ordinance of secession, before a shot had been fired?—that is to say, did the act of renouncing her allegiance alone take her out of the Union? If so, from what principle does

this result follow? The other side give what they suppose to be the principle, and I will come to that shortly. Independent of that, there surely can be no other. The denial of one's obligations can never *legally* effect his release from them, or change his *legal* relations to the one to whom the obligations are due. And in this complex Government of ours, the effect of a change of the legal relations of the State to the Union would be a change of the legal relations of the different States to each other. Let us look at some of the consequences. The mere act of secession of Mississippi, not followed by any collision of forces, would have the effect of depriving a citizen of Wisconsin or Illinois, going there, of his equal rights in Mississippi; would render the judgments in the courts of Mississippi no longer conclusive in the courts of Wisconsin or Illinois, and so of the judgments of those States in Mississippi; would make a judgment in the highest court of Mississippi no longer examinable in this Court, however repugnant to the Federal constitution and laws; would deprive a citizen of Wisconsin or Illinois of the right of suing in the Circuit Court of the United States for the Mississippi district; in fact, would drive that Court out of Mississippi, for certainly it cannot sit there, if that State is not as such in the Union. These are but examples; the list may be increased indefinitely.

And how could this state of things be remedied? You could not send the army there; for, in the case supposed, there would be no resistance to overcome. The consequences would be then in effect the withdrawal of a State from the Union without a blow.

Would a collision of forces change the *legal* relations, so as to effect by war what was not effected by secession? That depends upon the change which war produces—that is, it depends upon the nature and effect of belligerent rights. But these I have already considered, and I have shown, as I think, that the rights of the United States, as belligerents

give Congress no constitutional authority to pass these military statutes.

Let us now recur to the supposed principle upon which the other side deduce the result, that Mississippi is no longer a State of the Union. It is this, as I take it from their own language: Mississippi is not a *State* of this Union, because she "has no *State government* which is entitled to be recognized by the United States as a 'State' of this Union." Here is a fallacy at the outset, arising from a confusion of ideas. A *State* and the *government* of a State are two different things, as much so as a corporation and its governing body, or board of directors, are two different things. The original idea of a State is a community independent of all other communities. The States of the American Union, being originally independent, became united by the surrender of a portion of their sovereignty to a Nation composed of all the States. Whether their relations to this Nation can be dissolved or impaired, depends upon the nature of the union, whether it be, or be not, indissoluble. We all agree that it is indissoluble No argument is necessary, or could be permitted on this point.

But it is asked, might the State of Mississippi send Sentors to Congress during the war? I answer, no; for the simple reason, that there was nobody competent to send them. They must be sent by legislatures, acting under the Constitution of the United States. The Senate is the judge of the election and qualification of its own members, and is not bound to receive those who come in upon contempt of their authority, or with a feigned submission. There may be a State in this Union with a disloyal State Government. This proposition answers the argument made against us.

A State does not change with a change of its government. One of the fundamental doctrines of public law is, that the State is immortal. Governments, sovereigns, dynasties ap-

pear and disappear, but the State remains. The debts contracted by France under Napoleon the First, were the debts of France under Louis the 10th, under the citizen king, and under the republic.

The proposition of the other side, which we are considering, contradicts in fact their fourth proposition; for, if Mississippi be not a State of the Union, Congress has no power under the clause authorziing it to "guarantee to *every State in the Union* a republican form of government."

Second. Is war, in fact, and in law, still subsisting between the United States and the State or State government, or people of Mississippi, leaving out of view the declaration of our Legislative and Executive Departments?

This question is put with sole reference to what the Courts judicially know. You have stated in the prize cases the test of existing war. It is this, whether the Courts of justice are open, that is, whether the Federal Courts are open. You know that they are open. Some of your members have held Courts there; you know that the District Judges are holding their Courts; you know by this very case that the Circuit Court of the United States in Mississippi is performing its appropriate functions, for you are sitting in appeal from its decision.

Third. What has been the declaration of the Legislative and Executive Departments of the Federal Government upon the two questions we have just considered.

[1.] As to the *Executive* Department. We know *that* has recognized the existence of Mississippi as a State of the Union, the existence of a legal State government there, and the termination of the war.

[2.] As to the *Legislative* Department: That, too, recognized the *State*, and has recognized it to this hour. No act of Congress has ever been passed denying it, or questioning it. The statute book is full of acts of Congress since 1861, recognizing Mississippi as a State of this Union. In reference to the great constitutional amendment abolish-

ing slavery, Congress received from the Executive Department, without dissent, information of its adoption by several of the rebel States, Mississippi among the rest.

The legislative department also recognized the State government of Mississippi down to 1867. These military reconstruction acts were the commencement of the direct attacks by Congress upon the legal validity of the State government.

It is too late for Congress, after all this, to unsay what it has said, and attempt to invalidate that which it has sanctioned.

Fourth. What is the legal effect of the declaration made by Congress in the act of March 2d, 1867, respecting the *legality* of the State government of Mississippi? I have already answered that question.

As to the necessity of a declaration by Congress that war between the United States and Mississippi, has *ceased* I have to answer—

1. That no such declaration was necessary. Congress does not declare domestic war, and has no authority to declare it. So this Court has said in the prize cases. If the war had been a foreign war, it would have been for the President, and not Congress, to make peace; and if to make it, so to declare it.

2. That there are proofs everywhere in the acts of Congress, in the journals of the two Houses, in the reports of Committees, that the rebel armies were overthrown in 1865; that there is no force anywhere now in arms against the Union. There must be either peace or war. There is no war. That is proved from the records of Congress, not less than from the pages of current history.

But we are told that this is a *political* question, which is beyond the competency of the Courts to determine. A fortnight ago this objection would have come with more force than it comes now. The experience of a few days has taught many, what was understood by thoughtful ob-

servers before, that this Court is the great peacemaker, and that nothing but its peaceful interposition can prevent collisions of force.

What is a political question? Is it one which affects the policy of parties, or is decided by partizan views? Such a question is the very one that is most likely to lead the Legislative Department into excesses which it needs the Judicial to correct. If Congress were to pass an act of attainder, with a purely political motive, or for a purely political end, does any one suppose that this Court is not competent to pronounce it unconstitutional and void? A political question, I apprehend, is one which the political department of the Government has exclusive authority to decide.

But this question has received its final answer in the opinion of this Court, delivered by Mr. Justice Nelson, upon the bill exhibited by Georgia against the Secretary of War and others; and it would be presumptuous in me to debate now what is there decided so satisfactorily to all friends of constitutional government and so authoritatively for us all.

In conclusion, I submit that I have shown—

1. That there is no reason whatever for the proposition that Mississippi is not now a State of the American Union;

2. That not only is she a State of the Union, but her people have the rights of citizens of a State;

3. That whether she be or be not a State, or has or has not the rights of a State, the people there residing cannot be subjected to military government by the Congress of the United States; and

4. That therefore the petitioner, McCardle, is entitled to his release from the military commission which presumed to sit in judgment upon him.

DAVID DUDLEY FIELD,
Of Counsel.

APPENDIX.

I.

Extracts from the Debates in the Convention of 1787.

Resolved, That a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State. (2d Mad. Papers, 734.)

The eleventh resolution, for guaranteeing republican government, territory, &c., being read, Mr. Patterson wished the point of representation could be decided before this clause should be considered, and moved to postpone it, which was not opposed, and agreed to, Connecticut and South Carolina only voting against it. (2 Mad. Papers, 794)

The eleventh resolution for guaranteeing republican government and territory to each State being considered, the words "or partition," were, on motion of Mr. Madison, added after the words "voluntary junction;" Massachusetts, New York, Pennsylvania, Virginia, North Carolina, Georgia; ayes—7. Connecticut, New Jersey, Delaware, Maryland; no—4.

Mr. Read disliked the idea of guaranteeing territory. It abetted the idea of distinct States, which would be a perpetual source of discord. There can be no cure for this evil but in doing away States altogether, and uniting them all into one great society.

Alterations having been made in the resolution, making it read "that a republican constitution and its existing laws ought to be guaranteed to each State by the United States," the whole was agreed to, *nem con.* (2 Mad. Papers, 843.)

Resolved, That a republican constitution and its existing laws ought to be guaranteed to each State by the United States. (2 Mad. Papers, 861.)

Much has been said of the unsettled state of the mind of the people. He believed the mind of the people of America, as elsewhere, was unsettled as to some points, but settled as to others. In two points he was sure it was well settled; first, in an attachment to republican government; secondly, in an attachment to more than one branch in the legislature. (Col. Mason's Remarks, 2 Mad. Papers, 913.)

The sixteenth resolution, "That a republican constitution and its existing laws ought to be guaranteed to each State by the United States," being considered,

Mr. Gouverneur Morris thought the resolution very objectionable. He should be very unwilling that such laws as exist in Rhode Island should be guaranteed.

Mr. Wilson. The object is merely to secure the States against dangerous commotions, insurrections and rebellions.

Col. Mason.—If the general government should have no right to suppress rebellions against particular States, it will be in a bad situation indeed. As rebellions against itself originate in and against individual States, it must remain a passive spectator of its own subversion.

Mr. Randolph.—The resolution has two objects: first, to secure a republican government; secondly, to suppress domestic commotions. He urged the necsssity of both these provisions.

Mr. Madison moved to substitute "that the constitutional authority of the State shall be guaranteed to them respectively against domestic as well as foreign violence."

Doctor McClurg seconded the motion.

Mr. Houston was afraid of perpetuating the existing Constitutions of the States. That of Georgia was a very bad one, and he hoped would be revised and amended. It may also be difficult for the General Government to decide between contending parties, each of which claim the sanction of the Constitution.

Mr. L. Martin was for leaving the State to suppress rebellions themselves.

Mr. Gorham thought it strange that a rebellion should be known to exist in the empire, and the general government should be restrained from interposing to subdue it. At this rate an enterprising citizen might erect the standard of monarchy in a particular State, might gather together partisans from all quarters, might extend his views from State to State, and threaten to establish a tyranny over the whole, and the general government be compelled to remain an inactive witness of its own destruction. With regard to different parties in a State, as long as they confine their disputes to words, they will be harmless to the general government and to each other. If they appeal to the sword, it will then be necessary for the general government, however difficult it may be, to decide on the merits of their contest, to interpose and put an end to it.

Mr. Carroll.—Some such provision is essential. Every State ought to wish for it. It has been doubted whether it is a *casus foederis* at present, and no room ought to be left for such a doubt hereafter.

Mr. Randolph moved to add, as an amendment to the motion, "and that no State be at liberty to form any other than a republican government."

Mr. Madison seconded the motion.

Mr. Rutledge thought it unnecessary to insert any guarantee. No doubt could be entertained but that Congress had the authority, if they had the means, to coöperate with any State in subduing a rebellion. It was and would be involved in the nature of the thing.

Mr. Wilson moved, as a better expression of the idea, "that a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence."

This seeming to be well received, Mr Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed *nem. con.*" (2 Mad. Pap., 1139.)

Article 18 being taken up, the word "foreign" was struck out, *nem. con.*, as superfluous, being implied in the term "invasion."

Mr. Dickinson moved to strike out, "on the application of its Legislature, against." He thought it of essential importance to the tranquillity of the United States, that they should, in all cases, suppress domestic violence, which may proceed from the State Legislature itself, or from disputes between two branches, where such exist.

Mr. Dayton mentioned the conduct of Rhode Island, as showing the necessity of giving latitude to the power of the United States on this subject. On the question,—

New Jersey, Pennsylvania, Delaware; aye—3. New Hampshire, Massachusetts, Connecticut, Maryland, Virginia, North Carolina, South Carolina, Georgia; no—8.

On a question of striking out "domestic violence," and inserting "insurrections," it passed in the negative—

New Jersey, Virginia, North Carolina, South Carolina, Georgia; aye—5. New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland; no—6.

Mr. Dickinson moved to insert the words, "or executive," after the words, "application of its Legislature." The occasion itself, he remarked, might hinder the Legislature from meeting.

On this question—

New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, Georgia; aye—8.

Massachusetts, Virginia; no—2:

Maryland divided.

Mr. L. Martin moved to subjoin to the last amendment the words, "in the recess of the Legislature." On which question Maryland only aye.

On the question on the last clause, as amended—

New Hampshire, Massachusetts, Connecticut, New Jersey,

Pennsylvania, Virginia, North Carolina, South Carolina, Georgia; aye—9.

Delaware, Maryland; no—2. (3 Mad. Pap., 1466.)

Section 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive, (when the Legislature cannot be convened,) against domestic violence. (3 Mad. Papers, 1621.)

II.

Instances in which the legislative and executive departments have recognized Mississippi and other rebel States as in the Union:

§ In the apportionment of direct taxes.

Act of 5 Aug., 1861, xii U. S. Laws, 295.

Act of 7 June, 1862, xii U. S. Laws, 422.

Act of 6 Feb., 1863, xii U. S. Laws, 640.

Act of 25 June, 1864, xiii U. S. Laws, 159.

Act of 3 March, 1865, xiii U. S. Laws, 501.

Act of 20 July, 1866, xiv U. S. Laws, 331.

§ Organization or regulation of Federal courts.

Defining the circuits—Act of 15 July, 1862, xii U. S. Laws, 576, (which distributes the insurrectionary States by name.)

Act of 22 May, 1866, xiv U. S. Laws, 51.

Act of 27 July, 1866, xiv U. S. Laws, 300.

Act of 28 July, 1866, xiv U. S. Laws, 344.

Act of March 2, 1867, ch. 185, p. 545.

§ Public lands.

Act of 2 March, 1867, xiv U. S. Laws, 544.

Act of 30 June, 1864, xii U. S. Laws, 526.

Act of 21 June, 1866, xiv U. S. Laws, 66, applicable to the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida, and especially recognizing the laws of the States.

§ Non-intercourse acts.

Act of 13 July, 1861, xii U. S. Laws, 255, especially secs. 5 and 6.

Act of 20 May, 1862, xii U. S. Laws, 404.

Act of 2 July, 1864, xii U. S. Laws. 376.

§ Political acts.

Joint Resolution of 8 February, 1865, xiii U. S. Laws 567, (as to electoral colleges.)

Joint Resolution of 1 February, 1865, xiii U. S. Laws, 567, (amendment of Constitution. See xiii U. S. Laws. 774.)

Joint Resolution of 16 June, 1866, xiv U. S. Laws, 355, (amendment of Constitution.)

(5) Proclamations of the President of the United States to the same effect.

Proclamation of 15 April, 1861, U. S. Laws. vol. xii, p. 1258, appendix.

Ditto 19 April, 1861, xii U. S. Laws, p. 1258, appendix.

Ditto 27 April, 1861, xii U. S. Laws, p. 1259.

Proclamation of 3 May, 1861. xii U. S. Laws, p. 1260.

Ditto 10 May, 1861, xii U. S. Laws, p. 1260.

Ditto 16 August, 1861, xii U. S. Laws, p. 1262.

Ditto 12 May, 1862, xii U. S. Laws, p. 1263.

Ditto 19 May, 1862, xii U. S. Laws, p. 1264.

Ditto 1 July, 1862, xii U. S. Laws, p. 1266.

Ditto 22 September, 1862, xii U. S. Laws, p. 1267.

Ditto 1 January, 1863, xii U. S. Laws, p. 1268.

Ditto 2 April, 1863, xiii U. S. Laws, p. 730,

Ditto 8 December, 1863 xiii U. S. Laws, p. 737.

Ditto 18 February, 1864, xiii U. S. Laws, p. 740.

Ditto 5 July, 1864, xiii U. S. Laws, p. 742.

Ditto 8 July, 1864, xiii U. S. Laws, p. 744.

Ditto 11 April, 1865, xiii U. S. Laws, p. 753.

EXAMPLES.

ACT of August 6th, 1861, to provide increased revenue.

SEC. 8. *And be further enacted*, That a direct tax of twenty millions of dollars be, and is hereby, annually laid upon the United States, and the same shall be, and is hereby, apportioned to *the States*, respectively, in manner following:

* * * * * * *

To the *State of Mississippi*, four hundred and thirteen thousand eighty four and two-third dollars.

ACT of July 16, 1862, to amend the Judiciary act.

"*Be it enacted, &c.*, That hereafter the Districts of Maryland, Delaware, *Virginia, and North Carolina*, shall constitute the fourth circuit; the Districts of *South Carolina, Georgia, Alabama, Mississippi, and Florida*, shall constitute the fifth circuit; the Districts of *Louisiana, Texas, Arkansas*, Kentucky, and Tennessee, shall constitute the sixth circuit; the Districts of Ohio and Indiana shall constitute the seventh circuit; the Districts of Michigan, Wisconsin, and Illinois, shall constitute the eighth circuit," &c.

* * * * * * *

The allotment of the Chief Justice and the Associate Justices of the said Supreme Court to the several circuits, shall be made as heretofore.

ACT of March 3d, 1863, ch. 113.

Be it enacted, &c., That in all cases wherein the District Courts of the United States, within and for the several Districts of *Texas, Florida*, Wisconsin, Minnesota, Iowa, and Kansas had rendered final judgments or decrees prior to the passage of an act entitled "An act to amend the act of the third of March, eighteen hundred and thirty seven, entitled 'An act supplementary to the act entitled an act to amend the judicial system of the United States' approved July fifteenth, eighteen hundred and sixty-two, which cases

might have been brought, and could have been originally cognizable in a Circuit Court, said District Courts shall have power to issue writs of execution or other final process, or to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees aforesaid," &c.

Approved March 3d, 1863.

ACT of July 13, 1861, for the Collection of Duties.

The fifth section authorizes the President, *by proclamation to declare the inhabitants* of certain States or parts of States to be *in insurrection.*

JOINT RESOLUTION of February 8, 1865, declaring certain States not entitled to representation in the Electoral College.

"Whereas the *inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee* rebelled against the Government of the United States, and were in such condition on the eighth day of November, eighteen hundred and sixty-four; that no valid election for electors of President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day: Therefore,

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the States mentioned in the preamble to this Joint Resolution are not entitled to representation in the Electoral College for the choice of President and Vice-President of the United States for the term of office commencing on the fourth day of March, eighteen hundred and sixty-five; and no electoral votes shall be received or counted from said States concerning the choice of President and Vice-President for said term of office."

Approved February 8, 1865.

No. 52, 13th U. S. Laws, 774.

"*Wm. H. Seward, Secretary of State of the United States, to all whom these presents may come, greeting:*

"Know ye that whereas the Congress of the United States, on the 1st of February last, passed a resolution which is in the words following, namely:

(Reciting the Constitutional Amendment Abolishing Slavery.)

"And whereas the whole number of States in the United States is thirty-six; and whereas the before specially named States whose Legislatures have ratified the said proposed amendment constitute three-fourths of the whole number of States in the United States:

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the act of Congress approved the twentieth of April, eighteen hundred and eighteen, entitled 'An act to provide for the publication of the laws of the United States, and for other purposes,' do hereby certify that the amendment aforesaid has become valid, to all intents and purposes, as a part of the Constitution of the United States.

"In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

"Done at the City of Washington, this eighteenth day of December, in the year of our Lord one thousand [L. S.] eight hundred and sixty-five, and of the Independence of the United States of America the ninetieth.

"WILLIAM H. SEWARD,
"*Secretary of State.*"

Proclamation of President Lincoln, April 11, 1865, demanding reciprocity in treatment of war vessels, and ending as follows: "The United States, whatever claim or pretence may have existed heretofore, *are now, at* least, *en-*

titled to claim and concede *an entire* and friendly *equality of rights* and hospitalities with all maritime nations."

JOINT RESOLUTION restoring Tennessee to her relations to the Union.

"Whereas in the year eighteen hundred and sixty-one the government of the State of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said State, in pursuance of an act of Congress, here declared to be in a state of insurrection against the United States; and whereas said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas the people of said State did, on the 21st day of February, eighteen hundred and sixty-five, by a large popular vote, adopt and ratify a constitution of government whereby slavery was abolished, and all ordinances and laws of secession and debts contracted under the same were declared void; and whereas a State government has been organized under said constitution which has ratified the amendment to the Constitution of the United States abolishing slavery, also the amendment proposed by the Thirty-ninth Congress, and has done other acts proclaiming and denoting loyalty: Therefore,

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the State of Tennessee is hereby restored to her former proper political relations to the Union, and is again entitled to be represented by Senators and Representatives in Congress."

Approved July 24, 1866.

A Joint Resolution, June 16, 1866, (No. 49,) making eligible to admission in the Military Academy of any person who has served honorably and faithfully not less than one year as an officer or enlisted man in the army of the United States, either as a volunteer or in the regular service, in the

late war for the suppression of the rebellion, and who possesses the other qualifications prescribed by law, shall be eligible to appointment.

(No. 46.)—JOINT RESOLUTION of March 2, 1867, prohibiting payment by any officer of the Government to any person not known to have been opposed to the Rebellion and in favor of its suppression.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That until otherwise ordered, it shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government, which accrued or existed prior to the thirtieth day of April, A. D. eighteen hundred and sixty-one, in favor of any person who promoted, encouraged, or in any manner sustained the *late rebellion*, &c.

(No. 32.)—A RESOLUTION OF THANKS.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, "That it is *the duty and privilege of Congress to express the gratitude of the nation to the officers, soldiers, and seamen* of the United States, by whose valor and endurance, on the land and on the sea, *the rebellion has been crushed*, and its pride and power have been humbled, by whose fidelity to the cause of freedom the government of the people has been preserved and maintained, and by whose orderly *return from the fire and blood of civil war to the peaceful pursuits of private life*, the exalting and ennobling influence of free institutions upon a nation has been so signally manifested to the world."

Approved May 3d, 1866.

An act to change the place of holding the Circuit and District Courts of the United States in the District of West Tennessee, and for other purposes. Approved January 26, 1864.

An act to regulate the time, and fix the place for holding the Circuit Court of the United States in this District, and for other purposes. Approved May 22, 1866.

An act to fix the number of the Judges of the Supreme Court of the United States, and to change certain Judicial Circuits. Approved July 23, 1866.

An act for changing the time of holding the Circuit Court for the District of Virginia. Approved February 25, 1863.

An act to change and define the boundaries of the Eastern and Western Judicial Districts of Virginia, &c. Approved June 11, 1864.

See also Joint Resolution of 1866, 1st Sess., 39th Cong., Nos. 28, 84, 91, 93, 102, and Laws, Vol. 12, 505, and private Act of April 10, 1866, ib. 36, and the Proclamations of October 28, 1865, April 2, 1866, August 20, 1866, and October 8, 1866.

Reference made to State of Virginia, 12 U. S. Stat., 537.

Reference made to State of West Virginia, 12 U. S. Stat., 633, 634.

Existing insurrection and rebellion, 12 U. S. Stat., 281.

Present insurrection, 12 U. S. Stat., 319.

"Suppression of the rebellion and the future defence of this Government," (No. 10,) 12 U. S. Stat., 613. Feb. 22, 1862.

"Present rebellion," 12 U. S. Stat., 638, 1863.

Present rebellion, 12 U. S. Stat., 744, 1863.

Present rebellion, 12 U. S. Stat., 755, 756, 599.

"Within any of the States declared in insurrection," 12 U. S. Stat., 820.

"After the suppression of the rebellion," 12 U. S. Stat., 820.

"In suppressing insurrection," 12 U. S. Stat., 600.

Whereas an insurrection against the Government of the United States has broken out in the States of South Carolina, Georgia * * and the laws of the United States for the collection of the revenue cannot be effectually executed therein * *

And whereas a combination of persons, engaged in such insurrection, has threatened to grant pretended letters of marque * *

Procl. by President Lincoln, No. 4, April 19, 1861.

Whereas existing exigences demand immediate and adequate measures for the protection of the National Constitution and the preservation of the National Union by the suppression of the *insurrectionary combinations* * *

Procl. by President Lincoln, No. 6, May 3, 1861.

Whereas an *insurrection* exists in the State of Florida *

Procl. by President Lincoln, No. 7, May 10, 1861.

CHAP. XXVIII.—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the sum of $2,000,000 be, and the same is

hereby, appropriated out of any money in the Treasury not otherwise appropriated, to be expended, under the direction of the President of the United States, in supplying and defraying the expenses of transporting and delivering such arms and munitions of war as in his judgment may be expedient and proper to place in the hands of *any of the loyal citizens residing in any of the States of which the inhabitants are in rebellion* against the Government of the United States, or in which rebellion is or may be threatened, and likewise for defraying such expenses as may be properly incurred in organizing and sustaining, while so organized, any of said citizens into companies, battalions, regiments, or otherwise, for their own protection against domestic violence, insurrection, invasion, or rebellion.

July 31, 1861. 12 U. S. Stat., 283.

SEC. 52. *And be it further enacted*, That, *should any of the people of any of the States* or Territories of the United States or the District of Columbia *be in actual rebellion* against the authority of the Government of the United States at the time this act goes into operation, so that the laws of the United States cannot be executed therein, it shall be the duty of the President; and * * * *

12 U. S. Stat., 311. Aug. 5, 1861.

Whereas, on the 15th day of April, 1861, the President of the United States, in view of *an insurrection* against the laws, Constitution, and Government, * * did call forth the militia to *surpress said insurrection:*

* Now, therefore, I, Abraham Lincoln, President, * * do hereby declare that the inhabitants of the said States of Georgia * * are in a *state of insurrection* against the United States * * until such *insurrection* shall cease or has been surpressed. * *

Procl. by President Lincoln, No. 9, Aug. 16, 1861.

* Now, therefore, be it known that I, Abraham Lincoln, * do hereby declare and proclaim that the States of South

Carolina, Florida, Georgia, * are *now in insurrection and rebellion.* *

Procl. by President Lincoln, No. 14, July 1, 1862.

SEC. 11. *And be it further enacted,* That the President of the United States is authorized to employ as many persons of African descent as he may deem necessary and proper for the suppression of this rebellion. * *

12 U. S. Stat., 592. July 17, 1862.

SEC. 2. *And be it further enacted,* That on or before the 1st day of July next, the President, by his proclamation, shall declare in what States and parts of States *said insurrection* exists: and thereupon * *

12 U. S. Stat., 422. June, 1862.

* do hereby proclaim to and warn all persons within the contemplation * to cease participating in aiding, countenancing, or abetting the *existing rebellion* or any rebellion against the Government of the United States. *

Procl. by President Lincoln, No. 15, July 25, 1862.

No. 11.—Whereas, Miss Clara Barton has, *during the late war of the rebellion,* expended from her own resources large sums of money. * * *

14 U. S. Stat., 350. March 10, 1866.

No. 12.—*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That *Congress hereby recognizes the transfer of the counties of Berkeley and Jefferson from the State of Virginia* to West Virginia, and *consents thereto.*

14 U. S. Stat., 350. March 10, 1866.

SEC. 3. *And be it further enacted,* That the Board of Managers shall be composed of the President * * * * together with nine other citizens of the United States, not members of Congress; no two of whom shall be residents of the same State, but who shall all be residents of States which furnished organized bodies of soldiers to aid in *the late war for the suppression of the rebellion,* (no person be-

ing ever eligible who ever gave aid or countenance to the rebellion,) to be selected by joint resolution of the Senate.

* * * * * * *

SEC. 7. *And be it further enacted,* That the following persons only shall be entitled to the benefits of the asylum, and may be admitted thereto, upon the recommendation of three of the Board of Managers, namely: All *officers and soldiers who served in the late war* for the suppression of the rebellion, and not provided for by existing laws, who have been or may be disabled by wounds received or sickness contracted in the line of their duty. * * *

Chap. XXI, Sess. 1, March 21, 1866, XXXIX Cong., Vol. XIV, Stat. at Large, p. 58.

PRESIDENT'S PROCLAMATION, April 2, 1866.

"Now, therefore, I, Andrew Johnson, President of the United States, do hereby proclaim and declare, that *the insurrection* which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida, *is at an end, and is henceforth to be so regarded.*"

June 8, 1866.—SEC. 2. *And be it further enacted,* That no person, who has served in any capacity in the military or naval service of the so-called Confederate States *during the late rebellion,* shall hereafter receive an appointment as a cadet at the Military or Naval Academy.

June 8, 1866, Chap. CX, Sess. 1, XXXIX Cong., Vol. XIV, Stat. at Large, p. 59.

SEC. 3. *And be it further enacted,* That said Corporation shall have power to provide a home for, and to support and educate the destitute orphans of *soldiers or sailors who have died in the late war* in behalf of the Union of these States, from whatever State or Territory they may have entered the national service, or their orphans may apply. * * *

Chap. CCXLIX, July 25, 1866. 14 U. S. Stat., 247.

CHAP. CCXLVIII. * * * Also the claim of the

State of Iowa for repayment of certain moneys paid by said State in raising, arming, equipping, paying, and subsisting certain troops of the State maintained by the State on the Southern and Northwestern borders thereof *during the late rebellion*, for the purpose of defending the State against attacks by bushwhackers and Indians. * * *

Sess. 1, July 25, 1866, XXXIX Cong., vol. XIV Stat. at Large, p. 247.

SEC. 5. *And be it further enacted*, That the appointment to be made from among volunteer officers and soldiers under the provisions of this act shall be distributed among the States, Territories, and District of Columbia, in proportion to the number of troops furnished by them respectively to the service of the United States *during the late war*, reduced to an average of three years' term of service: Provided * * *

Vol. XIV, U. S. Stat., 332. July 28, 1866.

SEC. 21. * * * Shall be selected from volunteer officers or soldiers who have performed meritorious *service in the army* of the United States *during the late rebellion.*

14 U. S. Stat., p. 335. July 28, 1866.

SEC. 28. *And be it further enacted*, That nothing in this act shall be construed to authorize or permit the appointment to any position or office in the army of the United States of any person who has served in any capacity in the military, naval, or civil service of the so-called Confedeate States, or of *either of the States in insurrection during the late rebellion:* but any such appointment shall be illegal and void.

14 U. S. Stat., p. 336. July 28, 1866.

SEC. 3. *And be it further enacted*, That the proper accounting officers of the treasury be, and they are hereby, authorized, in the settlement of the accounts of the disbursing officers of the navy and marine corps, to allow, subject to the approval of the Secretary of the Navy, such credits for

losses of property and funds as have *occurred during the late rebellion*, and as shall occur hereafter, and * * *

14 U. S. Stat., p. 345. July 28, 1866.

(No. 102) * *; and whereas *since the surrender of the insurrectionary armies, and the disbanding and return of the Federal soldiers to their homes*, said tax is being, with manifest hardships, assessed and collected of them in many parts of the country: therefore * * * * * *

14 U. S. Stat., 371. July 28, 1866.

PRESIDENT'S PROCLAMATION, AUGUST 20, 1866.

"Now, therefore, I, Andrew Johnson, President of the United States, do hereby proclaim and declare that *the insurrection* which heretofore existed in the State of Texas *is at an end.*"

OCT. 8, 1866.—National Thanksgiving Proclamation.

* * * * * * * *

The *civil war* that *so recently closed* among us has not been anywhere re-opened. * * * * *

JAN. 8, 1867, p. 375.—Chap. VI., Sess. II, 39th Congress.—AN ACT to regulate the elective franchise in the District of Columbia.

* * * * * each and every male person, excepting paupers and persons under guardianship, of the age of twenty-one years and upwards, who has not been convicted of any infamous crime or offence, and *excepting persons who may have voluntarily given aid and comfort to the rebels in the late rebellion, &c.* * * * *

MARCH 2, 1867, p. 571.—39th Congress, Sess. 2, Resolution 46.— * * * * "It shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government, which accrued or existed prior to the thirteenth day of April, A. D. 1861, in favor of *any person who promoted* or encouraged, or in any manner sustained *the late rebellion.*"

MARCH 2, 1867.—39th Congress, Sess. 2, Chap. 170, sec. 5.—"That it shall be the duty of the officers of the army and

navy and of the Freedmen's Bureau to prohibit and prevent whipping or maiming of the person as a punishment for any crime, misdemeanor, or offence, by any pretended civil or military authority *in any State lately in rebellion*, until the civil government of such State shall have been restored and shall have been recognized by the Congress of the United States."

March 2, 1867, p. 422.—Chap. CXLV.—AN ACT to provide for a temporary increase of the pay of officers in the army of the United States, and for other purposes.

SEC. 2. *And be it further enacted*, That section 1 of the act entitled "An act to increase the pay of soldiers in the United States Army, and for other purposes," approved June twenty, eighteen hundred and sixty four, be ,and the same is hereby, continued in full force and effect for three years from and after *the close of the rebellion, as announced by the President of the United States by proclamation bearing date the twentieth day of August, eighteen hundred and sixty-six.*

March 2, 1867.—Chap. CLV, p. 432.—An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders, in the suppression of the late rebellion against the United States.

Be it enacted, &c., That *all* acts, *proclamations*, and orders *of the President of the United States*, or acts done by his authority, or approved *after the fourth day of March*, (*A. D.* 1861,) *and before the first day of July*, (*A. D.* 1866,) *respecting martial law, military trials by Court martial or military commissions*, or the arrest, imprisonment, or trial of persons charged with participation in the *late rebellion* against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice * * * * * are hereby approved in all respects, &c., &c.

MEM.—The foregoing pages, from 53 to 59, are to be added to the Appendix of Mr. Field's Brief in Ex Parte McCardle.

SUPREME COURT OF THE UNITED STATES.

No. 380.—December T., 1867.

EX PARTE, WILLIAM H. McCARDLE, APPELLANT.

The appellant, William H. M'Cardle, filed his petition in the Circuit Court of the United States for the Southern District of Mississippi, on the 11th day of November, 1867, for a writ of *habeas corpus*, to be directed to General Ord, or General Gillem, or both, by whom, or by whose orders, the petitioner alleged he was illegally imprisoned. The writ was issued, and the body of the appellant was produced in court, and full return made, setting forth the cause of imprisonment.

No issue was made upon the facts stated in the return; but the appellant moved for his discharge upon the ground of the insufficiency of the return as matter of law. The Circuit Court held the return sufficient, and remanded the appellant. He appeals to this court. The question involved is the sufficiency in law of the return.

Congress, by the act of March 2d, 1867, entitled "An act to provide for the more efficient government of the "rebel States," after reciting that no legal State government existed in those States, provided that they should be divided into military districts, and made subject to the military authority of the United States; that the President should assign to the command of each of said districts an officer of the army, not below the rank of Brigadier General, and detail sufficient military force to enable such officer to perform his duties and enforce his authority.

"Sec. 3. And be it further enacted, That it shall be the duty of each officer assigned as aforesaid, to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offences, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, &c."

"Sec. 4. And be it further enacted, That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted, and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: Provided, that no sentence of death under the provisions of this act shall be carried into effect without the approval of the President."

The return shows that the appellant was in military custody under and in pursuance of this act, and that a military tribunal was proceeding with his trial upon charges, as follows :

1. Disturbing the public peace, &c.
2. Inciting insurrection, disorder, and violence, &c.
3. Libel.
4. Impeding the reconstruction of the southern States, &c.

The first offence charged—disturbing the public peace—is clearly within the act; and the proceedings by the military tribunal to try and punish it, were regular in form. There was, therefore, no error in the decision of the Circuit Court remanding the prisoner, provided the act is constitutional.

It is immaterial to enquire whether or not the specifications sustain the charges. If not, the presumption is that it will be so declared by the military tribunal. In other words, one tribunal cannot rescue a prisoner from the custody of another having jurisdiction, and being about to try him, upon the ground that it will or may decide erroneously.

This brings us, therefore, to the great question involved in this record: Is the act of March 2, 1867, constitutional?

I shall attempt to establish the following propositions:

1. That Mississippi has no State government which is entitled to be recognized by the United States as a "State" of this Union; and that this has been determined by the political departments of this government.

2. That the decision so made is binding and conclusive upon this court notwithstanding the judges may think the decision erroneous.

3. That it is the undoubted right and duty of the United States to aid the loyal people of Mississippi in establishing a republican State government for that State, and that the United States is now engaged in the performance of that constitutional duty.

4. That the grant of power to the United States to "guarantee a republican form of government" to the States of the Union, not being restricted, by the Constitution, as to the means which may be employed to execute the power, Congress is the *exclusive* judge of what means are necessary in a given case.

5. That the act in question, with the act supplemental thereto, regarded as embodying the means adopted by Congress for this purpose, *violates no provision of the Constitution of the United States.*

If these propositions can be maintained, there is an end of this case. I shall argue them with the concession, at present, that from and after the surrender of the rebel armies, PEACE existed in all the rebel States in fact and in law; and that thereafter the government of the United States was remitted to the exercise of its peace powers only. All will agree, that, as soon as it can be said *judicially* that peace is restored, this consequence will follow; but the question remains,

When can this court say, Peace is restored?

And upon this point we maintain—

6. That inasmuch as Congress entered upon the prosecution of

war against the rebel states, in 1861, this court is, and will be, bound judicially to recognize war as still existing, until Congress shall declare peace to be restored, or shall cease to exercise any belligerent right towards those States; and that the Acts in question may be defended as an exercise of belligerent rights.

FIRST POINT.

That Mississippi has no State government which is entitled to be recognized by the United States as a "State" of this Union; and that this has been determined by the political departments of this government.

I.

What do we mean by "a State in the Union?"

This question lies at the threshold of any discussion of the power of Congress to control the reconstruction of civil governments in the south. If Mississippi is now a "State" of this Union in the same sense in which New York is, she should be allowed, immediately and unconditionally, her representation as such in Congress; and the United States should at once desist from any and every interference with her domestic affairs or polity, which would be improper with the State of New York; otherwise, if she is not such "State" in the Union.

The word State is found many times in the Constitution, and is employed with obviously different significations.

For instance, in the provision, Art. 3, Sec. 2: "In all cases in which a State shall "be a party, the Supreme Court shall have original jurisdiction," the word "State" is used in the political sense, and means the State government. On the other hand, in the provision, Art. 3, Sec. 2: "The trial "of all crimes, &c., shall be held in the State where the said crimes shall have been committed; but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed," the word State is used in a geographical sense, merely designating the place at which the United States shall try its criminals.

Story Com. on Const., Sec. 454, says:

"That it is by no means a correct rule of interpretation to construe the same word in the same sense, wherever it occurs in the same instrument. It does not follow either logically or grammatically, that because a word is found in one connection in the Constitution, with a definite sense, therefore the same sense is to be adopted in every other connection in which it ocurrs."

In Cherokee Nation *vs.* Georgia, 5 Peters 19, this rule of construction was adopted; and illustrated by the decision in that case that the Cherokee Nation was a "State," but neither a "State of the Union" nor "a foreign State."

The court says: "So much of the argument as was intended to prove the character of Cherokees as a State, as a distinct political society, separate from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. * * The act of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts."

In Scott *vs.* Jones, 5 How. 377, this court says:

"This seems to have been settled by this court as to the meaning of the word State when empowering one to bring an action. It must be a member of the Union. Cherokee Nation v. Georgia 5. Peters 18. And it is not enough for it to be an organized political body within the limits of the Union."

In Burton *vs.* Williams, 3 Wheat., 538. the States are spoken of as "The members of the American family."

Perhaps the clearest definition of a State of the Union is that given by Mr. Webster in the argument of Luther *vs.* Borden, 7 How., 1. He says:

"The aggregate community is sovereign, but that is not the soverignty which acts in the daily exercise of sovereign power. The people cannot act daily as the people. They must establish a government and invest it with so much of the sovereign power as the case requires; and this sovereign power being delegated and placed in the hands of the government, that government becomes what is popularly called the State. I like the old fashioned way of stating things as they are; and this is a true idea of a State. It is an organized government, "representing the collected will of the people, as far as they see fit to invest that government with power."

So the word Union may be, and is sometimes used in a political, sometimes in a geographical, sense.

Owing to the double meaning of these two words, many, who say a State cannot go out of the Union, mean that the people and territory of a State cannot be taken out from under the government of the United States. This is conceded. But it is a very different question, whether the present State government of Wisconsin, which is a State of the Union, can be abolished or destroyed by the people of that State.

In saying that Mississippi is not a State of the Union, we mean that it has no State government which has been decided by Congress to be Republican in form, either by direct declaration and enactment, or impliedly by the admission of her Senators and Representatives into Congress; and that consequently she has no State government which is entitled to be recognized in this court as a "member of the American family."

All concede that, previous to our late civil war, Mississippi was a State of the Union in every sense of that phrase. She had a government, the form of which Congress, by admitting her Senators and Representatives, had decided to be Republican in form, and in all respects in harmony with the Constitution of the United States. In 1862 and 1863 there was a *de facto* government of Mississippi, and but one; making laws, administering justice, exercising the usual powers of sovereignty, and actually levying war upon the United States. Now was that government during those years, and while so levying war, entitled to be represented in Congress? I am not discussing a question of taste; not asking whether it would have been delicate or decent for that government to send Senators to Washington to vote against supplies to our army; but whether, as matter of strict constitutional right, it was entitled to such representation?

The Constitution, Art. 1, Sec. 3, provides: "The Senate of the United States shall be composed of two Senators from *each State*," &c. This provision is subject to no exceptions as to time or circumstance. It is the same in times of peace, and in times of war, foreign or

domestic. And if the doctrine can be supported, that the *de facto* government of Mississippi during those years was a "State" within the meaning of this clause of the Constitution; or that it was, in a legal sense, the same government that Congress had admitted into the Union, then it would follow that she might have been so represented, provided she had sent Senators who, personally, were unobjectionable.

But the *de facto* government of Mississippi of 1862 and 1863 was not the government which Congress had recognized as a State of the Union. On the contrary, it had supplanted the old State government in every respect. The officers of the new government were sworn not to support, but to overthrow, the Constitution of the United States. It had no relations, and with its constitution could have none, with the United States; and its officers would have been guilty of treason to that government had they performed any of the duties towards the United States that the constitution of the old State government *enjoined upon its officers.* The new government had never been admitted into the Union; and of course could not be, for its constitution was in deadly antagonism with the Constitution of the Union. The new government was formed upon the ruins of the old, and instead of claiming fellowship with the States of the Union, had applied for, and been admitted into a *de facto* confederacy of States which was at war with the United States.

It is immaterial whether, after the people of Mississippi had resolved to throw off the authority of the United States, and to enforce that resolution by arms, they abandoned their former State constitution and government, and organized under an entirely new one; or took the old organization and changed it in all the essential particulars which made it a federal State. In one case, as in the other, it would be true that the new government, or the old one made new, was a different government from the one which had been admitted into the Union.

The convention which framed the constitution for the State of Florida, by an article in that instrument, adopted all the laws of the Territorial government, not in conflict with that constitution, and appointed all Territoral officers, civil and military, to be officers of the State, until they should be superseded by those elected under the State constitution. This was sanctioned by this court in Benner *vs.* Porter, 9 How. 242. As matter of fact, no act has been done by the old government of Mississippi; no officer has been elected or qualified under it; and no one has pretended to act in its name or claim its protection since the convention of that State formed a government, on the 9th day of January, 1861, with a view to admission into the rebel confederacy. The rebel government formed for that purpose entered upon the exercise, *de facto*, of sovereign powers, and was obeyed and supported by the people of that State. The old *federal State* government was abandoned to the condition "of weeds and outworn faces." When the war ended, there was no organization under the old federal State government; but on the contrary the rebel government was in full operation *de facto*, had a

governor, judges and a legislature, and all the machinery of civil government. It lacked the recognition of the mother government to make it a sovereign State *de jure;* it was one *de facto.*

II.

By ignoring all the facts, a specious argument can be made upon metaphysical abstractions, in support of the proposition, that the ordinances of secession, all changes in the State constitution, and all laws passed for the purpose of dissolving the federal relations of the State, being unconstitutional and therefore void, the old State government remained intact, even during the war, and such of its citizens as remained loyal to the Union were entitled to its protection as citizens; and that, consequently, on the suspension of hostilities, the old State government was entitled to the same rights and privileges as before the war. This view of the case was strongly urged in arguments made in this court in the prize cases at the December term, 1862. It was replied, that although the action of the State in dissolving its federal relations was unconstitutional and wrongful, yet it had the effect to destroy the old State government, and create in its stead another unlawful, unconstitutional government, outside of, because never admitted into, nor recognized by the Union; and that the people living under such unlawful government, while it was waging war upon the United States, were liable to be treated as public enemies, although not foreigners.

To have overlooked the fact that ten State governments had been supplanted by ten new *de facto* governments, which were exercising sovereign authority over eight millions of our people, with a well defined territory, held in hostility to the United States, and were actually waging against our government the most gigantic war of modern times, merely because all these things were unconstitutional, would have been the blindest devotion to an idea that the world has ever seen; a devotion better becoming a monk in his cell, than a statesman charged with the practical administration of political affairs. Accordingly, we find that it has been repudiated in turn by every department of this government.

A. This court gave it the first fatal blow.

In the opinion in the prize cases, 2 Black 671, this court says:

"We come now to the consideration of the second question, What is included in the term 'enemies' property'? Is the property of all persons residing within the territory of the United States now in rebellion, captured on the high seas, to be treated as 'enemies' property,' whether the owner be in arms against the government or not?

"The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign State at war with our own * * They contend, also, that insurrection is the act of individuals, and not of a government or sovereignty; and that the individuals engaged are subjects of law. Confiscation of their property can be effected only under a municipal law. That, by the law of the land, such confiscation cannot take place without the conviction of the owner of some offence; and, finally, that the secession ordinances are nullities, and ineffectual to release any citizen from his allegiance to the national government, and, consequently, that the Constitution and laws of the United States are still operative over persons in all States for punishment as well as protection.

"This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that when civil war exists, the party belligerent, claiming to be sovereign, cannot, for some unknown reason, exercise the

rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law, but his commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is unconstitutional!!!

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"Under the very peculiar Constitution of this government, although the citizens owe supreme allegiance to the federal government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws

"Hence, in organizing this rebellion they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the federal government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State.

"All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war upon their government, and are none the less enemies because they are traitors."

This decision goes to the bottom of the whole question, and determines that every citizen of Mississippi, during the years 1862 and 1863, was to be treated as a public enemy; and that, too, without regard to his personal loyalty or disloyalty. A Senator from Mississippi during those years, although a Union man in sentiment and loyal in conduct, coming within our lines, would have subjected himself to arrest, and been compelled to take his seat in the "Old Capitol." The only government that could have sent him here was engaged in levying war upon the Union. The people of Mississippi were all public enemies, and the only government existing there was merely a combination of rebels. I understand this opinion to have been unanimous, except as to the event from which the war should be dated. The majority held that the court should recognize the war as existing from the President's proclamation, April, 1861; the minority fixing it at the date of the act of Congress, July, 1861.

B. The President acted upon the same doctrine.

May 10, 1865, Governor Clark called an extra session of the legislature of the then existing *de facto* government of Mississippi, for the 18th of May. General Canby telegraphed to General Warren, commanding that department, as follows:

"By direction of the President, you will not recognize any officer of the confederate or State government within the limits of your command, as authorized to exercise in any manner whatever the functions of their late offices. You will prevent by force, if necessary, any attempt of any legislature of a State in insurrection to assemble for legislative purposes, and will imprison any member or other person who may attempt to exercise those functions in opposition to your orders."

Immediately after the surrender of the southern armies, the President issued a carefully prepared proclamation, countersigned by the Secretary of State, under the seal of that Department, appointing a provisional governor for North Carolina, which I quote in full, for its recitals of fact, and for expressions of opinion then entertained by the Executive upon this subject.

PROCLAMATION.

"Whereas, the fourth section of the fourth article of the Constitution of the United States declares that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion and domestic violence; and whereas, the President of the United States is, by the Constitution, made Commander-in-Chief of the Army and Navy, as well as civil executive officer of the United States, and to take care that the laws be faithfully executed; and whereas, the rebellion, which has been waged by a portion of the people of the United States, against the properly constituted authorities of the government thereof, in the most violent and revolting form, but whose organized and armed forces have now been almost entirely overcome, has in its revolutionary progress deprived the people of the State of North Carolina of all civil government; and whereas it becomes necessary and proper to carry out and enforce the obligations of the United States to the people of North Carolina, in securing them in the enjoyment of a republican form of government:

"Now, therefore, in obedience to the high and solemn duties imposed upon me by the Constitution of the United States, and for the purpose of enabling the loyal people of said State to organize a State government, whereby justice may be etsablished, domestic tranquillity insured, and loyal citizens protected in all their rights of life, liberty, and property, I, Andrew Johnson, President, and Commander-in-Chief of the Army and Navy of the United States, do hereby appoint William W. Holden Provisional Governor of the State of North Carolina, whose duty it shall be, at the earliest practical period, to prescribe such rules and regulations as may be necessary and proper for convening a convention, composed of delegates, to be chosen by that portion of the people of said State who are loyal to the United States, and no others, for the purpose of altering or amending the constitution thereof; and with authority to exercise, within the limits of said State, all the powers necessary and proper to enable such loyal people of the State of North Carolina, to restore said State to its constitutional relations to the federal government, and to present such a republican form of State government as will entitle the State to the guarantee of the United States therefor, and its people to protection by the United States against invasion, insurrection, and domestic violence: Provided, That in any election that may be hereafter held for choosing delegates to any State convention, as aforesaid, no person shall be qualified as an elector, or shall be eligible as a member of such convention, unless he shall have previously taken the oath of amnesty, as set forth in the President's proclamation of May 29, A. D. 1865, and is a voter qualified by the constitution and laws of the State of North Carolina, in force immediately before the 20th day of May, 1861, the date of the so-called ordinance of secession; and the said convention, when convened, or the legislature that may be thereafter assembled, will prescribe the qualifications of electors, and the eligibility of persons to hold office under the constitution and laws of the State, a power the people of the several States composing the Federal Uuion have rightfully exercised from the origin of the government to the present time.

"And I do hereby direct:

"First. That the military commander of the department, and all officers and persons in the military and naval service aid and assist the said Provisional Governor in carrying into effect this proclamation, and they are enjoined to abstain from, in any way, hindering, impeding, or discouraging the loyal people from the organization of a state government, as herein authorized.

"Second. That the Secretary of State proceed to put in force all laws of the United States, the administration whereof belongs to the State Department, applicable to the geographical limits aforesaid.

"Third. That the Secretary of the Treasury proceed to nominate for appointment assessors of taxes, and collectors of customs and internal revenue, and such other officers of the Treasury Department as are authorized by law, and put in execution the revenue laws of the United States within the geographical limits aforesaid. In making appointments, the preference shall be given to qualified loyal persons residing within the districts where their respective duties are to be performed. But if suitable residents of the districts shall not be found, then persons residing in other States or districts shall be appointed.

"Fourth. That the Postmaster General proceed to establish post offices and post routes, and put into execution the postal laws of the United States within the said State, giving to loyal residents the preference of appointment; but if suitable residents are not found, then to appoint agents, &c., from other States.

"Fifth. That the district judge of the judicial district in which North Carolina is included, proceed to hold courts within said State in accordance with the provisions of the act of Congress. The Attorney General will instruct the proper officers to libel and bring to judgment, confiscation and sale, property subject to confiscation, and enforce the admin-

istration of justice within said State, in all matters within the cognizance and jurisdiction of the federal courts.

"Sixth. That the Secretary of the Navy take possession of all public property belonging to the Navy Department, within said geographical limits, and put in operation all acts of Congress in relation to naval affairs having application to the said State.

"Seventh. That the Secretary of the Interior put in force the laws relating to the Interior Department applicable to the geographical limits aforesaid.

"In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington, this twenty-ninth day of May in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

[SEAL] "ANDREW JOHNSON."

"By the President:

"WILLIAM H. SEWARD, Secretary of State."

A similar proclamation was issued, dated June 13, 1865, appointing Hon. William L. Sharkey Provisional Governor of Mississippi. *Senate Ex. Doc.* 26, 1 *Sess.* 39 *Congress.*

The entire proceedings of the Executive Department, for months after the surrender of Lee and Johnson, can be explained and justified upon no other theory.

May 3d, 1865, Gov. Brown, of Georgia, called an extra session of the legislature for the 22d of that month. Gen. Gilmore, acting for the President, issued a military order annulling this proclamation.

May 8th, 1865, Gov. Magrath, of South Carolina, summoned the officers of the rebel government to the capital to resume their official duties. Gen. Gilmore nullified this order. The same or similar proceedings were had in other States.

At a later period the President acted officially, in a matter of great delicacy and importance, upon the same theory. By the Constitution, the United States can interfere to put down domestic violence in a State, only when called on by the legislature of the State, or by the Executive, when the legislature cannot be convened. At the time of the disgraceful and murderous riot at New Orleans, the President was brought face to face with this subject; for if Louisiana was to be considered a State of the Union, the President could interfere only when called on by the legislature, or by the governor. Yet it is well known that he not only did not wait for an application from the governor, but virtually set him aside, and communicated directly with the attorney general of the *de facto* government of Louisiana, authorizing him to call in federal troops.

These proceedings afford conclusive evidence of the President's views upon this subject.

C. Congress, by the act in question, has declared that no legal State government exists, even yet, in either of the rebel States.

III.

The proceedings of the legislative, executive, and judicial branches of this government all proceed, as we claim, upon the theory that the rebel government of Mississippi, which was in existence *de facto* during the war, and at its close, was not a member of this Union; that Mississippi had no State government which could be so regarded; and that so far, Congress and the President agree.

IV.

It remains to be considered whether the government, which was organized under the authority of the President, and which has never been recognized by Congress, can be regarded as a "State of the Union."

A proclamation was issued in the case of Mississippi, similar to that hereinbefore quoted in the case of North Carolina; and the provisional governor so appointed called a convention for Mississippi, and by proclamation fixed the qualifications of voters as follows:

"Voters for delegates to this convention must possess the qualifications required by the Constitution and laws as they existed prior to the 9th day of January, 1861, and must also produce a certificate that they have taken, before a competent officer, the Amnesty Oath pressribed by the proclamation of the 20th of May, 1865, which certificate shall be attached to or accompanied by a copy of the oath, and no one will be elligible as a member of this convention, who has not also taken this oath."

This convention met on the 14th day of August, 1865; and while it was in session, the President approved the action of Governor Sharkey, by telegram, as follows:

"EXECUTIVE OFFICE, *Washington, D. C., August* 15, 1865.

"Governor W. L. SHARKEY, *Jackson, Miss.*:

"I am gratified to see that you have organized your convention without difficulty. I hope that without delay your convention will amend your State constitution by abolishing slavery and denying to all future legislatures the power to legislate that there is property in man; also that they will adopt the amendment to the Constitution of the United States abolishing slavery. If you could extend the elective franchise to all persons of color who can read the Constitution of the United States in English, and write their names, and to persons of color who own real estate valued at not less than two hundred and fifty dollars, and pay taxes thereon, you would completely disarm the adversary, and set an example the other States will follow. This you can do with perfect safety, and you thus place the southern States, in reference to free persons of color, upon the same basis with the free States. I hope and trust your convention will do this, and as a consequence, the radicals, who are wild upon negro franchise, will be completely foiled in their attempt to keep the southern States from renewing their relations to the Union by not accepting their senators and representatives.

"ANDREW JOHNSON, *President of the U. S.*"

This convention agreed upon a constitution of State government, under which State and county officers and representatives to Congress were elected in the fall of 1865; Benjamin G. Humphrey, having been elected governor, was inaugurated October 17, 1865; and that government continued in existence, *de facto*, until the passage by Congress of the act in question, March 2, 1867.

This act in its preamble recites, as follows:

"Whereas, no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas; and whereas, it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established; Therefore be it enacted," &c.

It was followed by a supplementary act, passed March 23, 1867, directing a registration of voters, and prescribing their qualifications; also, providing for the holding of elections for delegates to constitutional conventions, to frame constitutions of State governments for all the States above named.

These acts were both vetoed by the President, and subsequently passed by the constitutional majorities in both houses.

The President proceeded to execute these laws by assigning officers of the army to the command of the respective military districts created by the act; and the construction of a State government for the State of Mississippi is now in progress.

So far as there is any pretence of civil administration in that State at present, it is by the government which was created and organized under the auspices of the President. It is therefore necessary to inquire whether there is any virtue in that government.

The objection made to the proceedings taken by the President, and those acting under his authority, is simply this: they were taken without legal authority, the power to reorganize a State government for the State of Mississippi being exclusively in Congress. If this objection can be sustained, it must follow that the validity of that government depended entirely upon the subsequent approval of Congress.

V.

It is very clear that the whole subject of admitting States to the Union, and reconstructing State governments, is political in its nature, and belongs exclusively to the political power. When Congress and the President agree in sentiment and action, their determination of any question is the settlement of it by the political power of the government; and it is therefore clear that the political power has determined that there was no "State" of Mississippi in the Union at the close of the war. But in case Congress and the President disagree, and attempt to determine a purely political matter differently, how shall it be determined by this court what has been settled? In other words, as between Congress and the President, in case of their disagreement, where does the political power reside? This must be settled by the Constitution, construed in the light of the circumstances which attended its adoption.

The powers conferred by the Constitution are vested in three equal, co-ordinate departments—the legislative, executive, and judicial. This court and its subordinates possess all the judicial power of the government, and no other power. The political power is vested in Congress and the President, and its exercise by those departments is provided for in the Constitution.

Our people, before the revolution, were Englishmen. The patriots and statesmen who led the people through that contest and fashioned the government of the United States were deeply learned in the constitutional history of the mother country. They were conversant with the successive struggles by which British subjects had wrested political privileges from the monarchs of the Plantaganet and Tudor lines, and vested them, for safe-keeping and practical exercise, in parliament. Jealousy of executive power is one of the most prominent features of the sentiment of that time. Consequently, as might be expected, Congress, within the field of federal

powers, is as omnipotent as parliament in the realm of England. The subjects over which the President has exclusive power and discretion are few, and clearly specified and defined. He may grant pardons, may receive ambassadors from foreign powers, commission officers, and perform other acts so purely executive in their nature as to call for no legislative action. But all the great discretionary powers of the government are vested in Congress. Congress is, in an especial sense, the representative of the people; responsible, by the two years tenure-of-office in one house, to constant popular control. Here it was thought power could be most safely trusted. The office of President, even with the few powers conferred upon it, was made the subject of special attack by its enemies, when the Constitution was before the people for their ratification. Even the qualified veto power was assailed as a kingly prerogative over the will and wishes of the people, as expressed by their immediate representatives in Congress. Yet the Constitution, in spite of these objections, was adopted; and such power as it conferred on the President he is undoubtedly authorized to wield. But what are his powers? He cannot declare war, nor levy taxes, nor coin money, nor admit States. His powers are those enumerated in the second article of the Constitution. But there is no clause of that article, or of any other in the Constitution, conferring upon him any power to interfere with the States, or the people of the States, except to execute the laws. The power possessed by the President to call out troops to suppress an insurrection in a State is conferred upon him by act of Congress, not by the Constitution.

Martin *vs.* Mott, 12 Wheat., 28.

Luther *vs.* Borden, 7 How., 1.

All the great political powers of the government which affect its relations to the States and the people of the States are vested in Congress; and the extent of the President's control over their exercise is the veto, which the Constitution gives him the right to interpose, and to overcome which requires two-thirds majorities in both houses. If the President recommends the admission of a State, and Congress dissents, it passes no law; and the matter is ended. If Congress wishes to admit a State, which the President thinks should not be admitted, the President may veto the bill; but if Congress re-passes it by the proper majorities, the bill becomes a law, and the State is admitted. Congress, in regard to the subject under consideration, adopted a plan for a State government for Mississippi—a matter of pure political concern—by its act of March 2, 1867, and the supplemental act of March 23, 1867. The President, disapproving, vetoed these bills, and they were then duly passed over his veto; after which the President was bound to execute them. This he proceeded to do, by assigning officers of the army to the command of the respective military districts created by the act. This court has been officially informed by the President, through the Attorney General, in Mississippi *vs.* Johnson, 5 Wallace 492, that

"From the moment they [the reconstruction acts] were passed over his veto, there was but one duty, in his estimation, resting upon him, and that was faithfully to carry out and execute these laws."

VI.

We claim, therefore, that the political departments of this government have decided, the President and Congress fully concurring, that at the close of the war there was no State government of Mississippi which could be recognized by the United States *as a State of the Union*.

We claim, also, that the political departments have decided, the President dissenting, but being overruled by the constitutional majority in each house, that there is now no State government of Mississippi which can be recognized by the United States.

But in regard to this important subject, reconstruction, we are not left to general principles, to establish the jurisdiction of Congress. The constitution is clear and precise; and by plain and express language confers this power upon Congress. Conceding what the President claims, that the right of this government to interfere in this behalf, results from the power which is conferred by the Constitution to guarantee a republican form of government to the State of Mississippi, the language of the Constitution is: "The *United States* shall guarantee to every State," &c. This clause grants the power in general terms to the government of the Union, but does not distribute it among the three departments, legislative, judicial and executive. But Article 1, Section 8, sub. div. 18, provides; That the Congress shall have power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States," &c. Art. 2, Sec. 3, provides: That the President "shall take care that the laws be faithfully executed," &c.

These three provisions cover the whole subject.

(1.) The United States has the power.

(2.) The Congress shall pass laws to carry the power into execution; and

(3.) The President shall take care that such laws be faithfully executed.

When the war cloud was lifted from the country, and the President, surveying the ground, saw ten prostrate State governments; and eight millions of our people without the protection of local law, it would seem that his constitutional duty was plain. That was one of those "extraordinary occasions" which would have justified him in calling an extra session of Congress. He could then have informed them of the "state of the Union," recommended to their consideration such measures as he judged necessary and expedient; and his remaining duty would have been to take care to execute such laws as Congress, in its discretion, might see fit to enact.

It is plain that the President has no duty to perform, in regard to reconstruction, but to execute the laws of Congress. What law was the President executing when he appointed a provisional governor of Mississippi, and directed him to call a convention? What was his guide in fixing the qualifications of voters who should elect the

delegates? Or the qualifications of delegates? All these matters, so properly subjects for legislative adjustment, he regulated by an exercise of his own good pleasure. He was, in all of them, executing no law. There was none to execute. He was *making law* by his proclamation alone; doing precisely what Congress subsequently did by the supplemental act of March 23, 1867. It is immaterial whether the qualifications of voters, imposed by that proclamation, were proper or not. The President had no more power to impose JUST than UNJUST conditions. It was a matter wholly beyond his jurisdiction; clearly belonging to the legislative department. Nor is it material to inquire into the merits or demerits of the constitution which was framed by that convention. It is enough to say of it, that Congress—the sole authority of the government in that behalf—has not only not approved it, but has expressly declared it not to be a "legal State government."

In the proclamation issued at the beginning of the President's proceedings, his authority is placed upon the double ground, that he is President, and also commander-in-chief of the army and navy. There is certainly no provision of the Constitution which vests any such power in the President, in his civil capacity; and it will not be contended, IN THIS COURT, that such a power is incident to the command of the army and navy. The commander-in-chief may demolish governments levying war upon the United States. But there HIS power ends. It is unnecessary to inquire into the nature and extent of the WAR POWERS of the President while the war continues; because, when war stops, the war power slumbers. From the moment the war was terminated, the President had no more power over the people of Mississippi, than over the people of New York. In either State he was bound to execute any law of Congress affecting the people in such State; and in neither could he do anything more.

VII.

This power is sometimes claimed for the President in popular discussions, from the fact that the courts are bound by his recognition of Foreign States. The reason of this principle limits its application. In regard to foreign nations, his recognition is followed by the courts, because the Constitution vests in him alone the duty of receiving ambassadors and other public ministers; and it is a universal principle, applicable to all departments of government, and to every officer of the law, even to a justice of the peace or constable, that the exercise of a discretionary power is conclusive upon every body, and reviewable nowhere. But the President is not authorized to receive ambassadors from the States of this Union; nor are the States authorized to send them to the government of the United States, or to any Foreign Power.

VIII.

It is undoubtedly true that Congress might have approved this State government, presenting itself for admission to the Union; and that the admission of her senators and representatives to seats in

Congress would have been proper and conclusive evidence that her Constitution was republican in form, and that she was entitled to all the rights of a State of the Union. That would have precluded all question in this court; because as this court has said in Luther *vs.* Borden, 7 How., 1, "It rests with Congress" to determine that question, "And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

Congress admitted the State of Michigan under a constitution which had been framed by the voluntary action of the people, without enabling act of Congress. It was said, when this question was being discussed in Congress, that it was for Congress to say whether it would approve or disapprove of what had been done in its name, but without its previously granted authority. And Congress being satisfied that her constitution was republican in form, and had been adopted by a majority of her people, saw fit to waive all irregularities, and admit her as a State of the Union; after which her proceedings, even before she was admitted, became valid, and conclusive upon the court.

(Cong. Globe, 1836, 1837—Title Michigan.)

In Scott *vs.* Jones, 5 How., 343, a suit brought to test the validity, after her admission into the Union, of statutes previously passed by the State government of Michigan, this court said :

"And after such bodies (State governments not yet admitted) are recognized as having been duly organized, and are admitted into the Union, if they ever be, the judicial tribunal of the general government, which acquiesces in the political organization that has been professing to pass statutes, and which admits it as a legal and competent State, must treat its statutes passed under that organization as they would the statutes of any other State."

So California was admitted with a constitution adopted by a convention called by a military governor. The admission of the State by Congress was a full ratification of all the preliminary proceedings to organize the government. But no favor was ever given to the idea that such a government possesses any validity until admitted into the Union by Congress. A principal may always ratify whatever has been done in his name, but without his authority; and this applies to acts done in the name of a government. This power of Congress subsequently to recognize any action or proceeding which lacks no element of validity, except its previous consent, was declared by this court in the prize cases, 2 Black, 671, where it was held, that even conceding the invalidity of the President's proclamation of blockade, &c., for want of congressional sanction, the subsequent legislation of that body had fully ratified the President's acts. And the court quote with approval the following extract from the opinion of Mr. Justice Story in Brown *vs.* United States, 8 Cranch, 831: "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy when the sovereign has prohibited it. But *suppose he did*, I would ask if the sovereign may not ratify his proceedings, *and thus, by retroactive operation*, give validity to them."

IX.

There is no subject that can claim the attention of this government more peculiarly within the province of Congress, than that of the admission of States; and so it has been repeatedly decided by this court. But the authorities upon this subject I shall cite under the second point of this brief.

It will be said that this principle in regard to the admission of new States has no application to the case of Mississippi, which has been admitted to the Union. Of course not, unless I establish the proposition that there was, at the termination of the war, no "State of Mississippi," within the meaning of the Constitution; and that the *new State government* to be formed must be submitted to the inspection of Congress for determination as to its republican form, before it can be recognized by this court as a *member of the American family*. But, if I am correct in that part of the argument, the decisions of this court, in regard to the admission of States, are as applicable to reconstructed old States, as to organized new ones. Because it cannot be maintained that the people of Mississippi, after the war, could have organized a government in monarchical form, and claimed it to be in the Union, without an inspection by Congress, upon the ground that she had formerly been in the Union by consent of Congress. That consent—the former admission of Mississippi—rested upon the judgment of Congress that her constitution was republican. But that government having been destroyed, and a new one created, the admission of Mississippi is the admission of a new State. That is, the State government, shown to be "the State," is not the same that was in the Union before the war. It is a new creation.

This is the view at first entertained by the Executive Department, as appears from the following correspondence between that department and the provisional governor of Florida:

DEPARTMENT OF STATE,
Washington, July 14, 1865.

SIR: I am directed by the President to inform you that on yesterday he appointed you provisional governor of the State of Florida. A copy of his proclamation for the organization of that State is herewith enclosed, which will serve to guide you in the discharge of your duties. You will also herewith receive a form of an official oath, which you will cause to be administered to you, and will then return the same for file in this department.

Your compensation will be at the rate of three thousand dollars a year, which you can receive monthly or quarterly, as you may perfer, on directing your drafts to this department.

I am, sir, your obedient servant,

WILLIAM H. SEWARD.

WILLIAM MARVIN, Esq., *Washington*.

Senate, Ex. Doc. 26. 1. *Sess.* 39 *Cong. p* 202.

OFFICE OF THE PROVISIONAL GOVERNOR,
Tallahassee, Fla., August 29, 1865.

SIR: I arrived in Jacksonville on the 2d of August, made a speech to the people on the 3d, and issued from the press on the same day a printed address, which I heretofore sent you. I left Jacksonville on the 7th, on my way to Tallahassee. The people, being advertised of my route, met me at Lake City and Madison, at both of which places I made a speech. I was received at Tallahassee and addressed by a committee of the citizens in a formal manner. I have seen and conversed with people from all parts of the State. The

result of my observations is that the people have had quite enough of war; that they are quite willing to accept the new order of things as settled. I think they are prepared to incorporate into their State constitution all necessary provisions to secure the freedom of all men alike, without distinction of color, and they regard the whole doctrine of secession as an exploded political heresy. They will be disposed to elect loyal men to Congress. In short, I am at present hopeful as to the future political status of the State. My apprehensions for the future are founded on the social condition of the people—of two races nearly equal in numbers being able to live in peace and harmony together.

Both races are at present under the discipline of military rule—living in peace and tolerable harmony. The negroes generally remain on the plantations under contracts for labor and wages, or a part of the crop.

Much credit is due to Brigadier General Vogdes, who was the first to take military occupation of the country, for the good sense and sound principles he displayed in his general orders regulating the police and labor of the country.

Major General Foster co-operates with me cheerfully in everything I desire.

I have the honor to be, very respectfully, your obedient servant,

WILLIAM MARVIN,
Provisional Governor.

Hon. WILLIAM H. SEWARD, *Secretary of State.*.

Same Doc., p. 203.

PROCLAMATION.

* * * * * * * * *

Tenth. *Upon the establishment of a republican form of State government,* under a constitution which guarantees and secures liberty to all the inhabitants alike, without distinction of color, *there will no longer exist any impediment* in the way of restoring the State to its proper *constitutional relations to the government of the United States,* whereby its people will be entitled to protection by the United States against invasion, insurrection, and domestic violence.

Given at Tallahasse, Florida, this 23d day of August, 1865.

WILLIAM MARVIN,
Provisional Governor.

SAMUEL J. DOUGLAS,
Private Secretary.
August 26, 1865.

DEPARTMENT OF STATE,
Washington, September 12, 1865.

SIR: Your excellency's letter of the 29th ultimo, with the accompanying proclamation, has been received and *submitted to the President.* The steps to which it refers, towards reorganizing the government of Florida, seem to be in the main judicious, and good results from them may be hoped for. The presumption to which the proclamation refers, however, in favor of insurgents who may wish to vote, and who may have applied for, but not received, their pardons, is not entirely approved. All applications for pardons will be duly considered, and will be disposed of as soon as may be practicable. *It must, however, be distinctly understood that the restoration to which your proclamation refers will be subject to the decision of Congress.*

I have the honor to be, your excellency's obedient servant,

WILLIAM H. SEWARD.

His Excellency WILLIAM MARVIN,
Provisional Governor of the State of Florida, Tallahassee.

Same Doc., page 205.

From the above, it is manifest that in 1865 the President regarded Congress as possessing the ultimate power of determining whether the new State government was republican in form, and entitled to be admitted into the Union.

X.

Hence it may be said that the determination of Congress in this instance, by two-third majorities in both houses over the veto of the President, that no State government at present exists in the State of

Mississippi, is the determination of the question in dispute by the political departments of the government; and is as binding and conclusive upon this court as if Congress and the President had fully concurred upon every point involved in the determination of the question. It is the fact that it has been decided by the political power that binds this court.

SECOND POINT.

That the decision of the political power, that Mississippi is without any State government which can be recognized by the United States, is binding and conclusive upon this court, although the judges may think the decision erroneous.

In considering the distribution of powers among the departments of the government. we must recur to the fundamental principles of our government. The presumptions in favor of the integrity and ability of those who administer a government, are all presumptions under the government, and are totally different from the principles upon which constitutional governments are founded. From the revolution of 1688 in England to our own, the best political writers England has ever produced had discussed all the problems of government, and examined critically the foundations upon which a people might hope to build a government that would not enslave them. One axiom laid down by all writers of that day, illustrated by all history, and as true now as then, is, that power tends to corrupt those who exercise it, and hence an absolute necessity for restraining its arrogance with something more than paper limitations and written constitutions. To those who claim that even judicial power is bestowed upon the charitable belief that it will not be abused, a few quotations may be of service.

Humes Phil. Works, Vol. 3, p. 39, 40, says:

"Political writers have established it as a maxim, that in contriving any system of government, fixing the several checks and controls of the Constitution every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest. By this interest we must govern him, and by means of it, make him, notwithstanding his insatiable avarice and ambition, co-operate to the public good. Without this, we shall in vain boast of the advantages of any constitution, and shall find in the end that we have no security for our liberties or possessions, except the good will of our rulers; that is, we shall have no security at all.

"It is, therefore, a just political maxim that every man must be supposed a knave, though at the same time it appears somewhat strange that a maxim should be true in politics which is false in fact. But to satisfy us on this head we may consider that men are generally more honest in their private than their public capacities, and will go further lengths to serve a party than when their own private interest is concerned. o o o When there offers, therefore, to our censure and examination, any plan of government, real or imaginary, where the power is distributed among several courts and several orders of men, we should always consider the separate interests of each court and each order; and if we find that, by a skillful division of power, this interest must necessarily, in its operation, concur with the public good, we may pronounce that government to be wise and happy. If, on the contrary, separate interests be not checked, and be not directed to the public, we ought to look for nothing but faction, disorder, and tyranny from such a government. In this opinion I am justified by experience, as well as by the authority of all philosophers and politicians, both ancient and modern."

Chipman on government, p. 44, says. "Moralists have embraced different systems especting the origin of moral evil, and the natural disposition of man as affected by virtue

and vice. Political writers have uniformly agreed. From Machiavel to Dr. Price, all have asserted, or admitted, that in a political character, when entrusted with power, man is wholly depraved, wicked, and corrupt; that in power the utmost perversion is inherent in his very nature; that he is never good, but through necessity. Hence mutual checks, restraints, and opposition of powers are found necessary to guard against the oppression of rulers."

Montesquieu says: "Constant experience shows us that every man invested with power is apt to abuse it. So endless and exorbitant are the desires of men that they will grasp at all, and can form no scheme of perfect happiness with less."

The only hope our fathers had of establishing a permanent constitutional government was by a careful distribution of powers among three departments—legislative, executive, and judicial. The only means of accomplishing this end was to make each independent of the other, and each supreme within its own sphere. An appeal from one to the other, or from two to one, would make the one appealed to the supreme power of the government, and vest all powers in one tribunal. This is pure despotism, as Louis XVI, his nobility and people learned, wading in blood. But had our fathers intended to vest such supreme and ultimate supervision in one, over the other department, that one would not have been a tribunal of eight or *ten* magistrates independent of the people by life tenure of office, and assured of salary that may not be diminished. All the clamor out of doors, to the effect that the rights of our people are not safe in the hands of Congress, and can only be protected by an appeal to this court, rests upon doctrine which, proclaimed at Monticello, would make one dead democrat turn in his coffin.

Mr. Madison said, 43 Niles's Register, Sup. 26:

"In case of disputes between independent parts of the same government, neither part being able to consummate its will, nor the government to proceed without a concurrence of its parts, necessarily brings about an accommodation."

And again he says, 1 Cong. Annals 520: "But I beg to know upon what principle it can be contended, that any one department draws from the Constitution greater powers than another in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the government, it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the consitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to disclose their sentiments on that point."

These quotations show that security against oppression by the government, was expected from the distribution of powers between the departments of the government.

While the temptation may be greater to those occupying the political departments to usurp power, than it can be to the courts, yet usurpation is as fatal to the balance of powers contrived and ordained by the Constitution, in one case as in the other. Indeed, more dangerous in the latter case, because the decisions of the courts cannot be brought to a public discussion before the people, and their errors be thus corrected, without destroying that respect for the civil courts, which is necessary to sustain their judgments in cases clearly within their power to determine. Errors in the proceedings of Congress may be corrected by electing new members at any elec-

tion; but erroneous decisions of the courts of law stand as precedents for the indefinite perversion of justice.

Brown *v.* Maryland, 12 Wheaton, 419.
Providence Bank *v.* Billings, 4 Peters, 514.
Wynchamer *v.* Peo., 3 Ker. 391, 428, 429, 430, 432, 456, and 477.
People *v.* Cowles, 3 Kerr, 360.
People *v.* Brooklyne, 4 Comst'k, 432.
Bank *v.* Brown, 26 N. Y., 467.
Carthew *v* Fire Department, 26 N. Y., 529.

In Wynchamer *v.* People, 3 Kernan, 477, Johnson J., although dissenting from the application made of principle in that case, laid down the same general principles as the other judges, in the following language :

"Should the time ever come when the courts, instead of promptly sustaining and enforcing the legislative will, become forward to thwart and defeat it, and assume to prescribe limits to its exercise other than those prescribed in the Constitution ; to substitute their discretion and notions of expediency for constitutional restraints, and to declare enactments void for want of conformity to such standards ; or when, to defeat unpalatable acts, they shall habitually resort to subtleries, and refinements, and strained constructions, to bring them into conflict with the Constitution, the end of all just and salutary authority, judicial as well as legislative, will not be remote. When men, chafing under the restraints of particular statutes, and prompted by interest, passion, appetite, or partizanship, to disregard them, and set their authority at defiance, once begin to expect from courts immunity and protection, instead of punishment, the judiciary will have lost, not only its claim to respect and confidence, but the power of enforcing general laws. Courts can only sustain their own authority and efficiency by vigilantly and fearlessly upholding and sustaining legislative enactments, in all cases where they are not plainly and clearly in derogation of constitutional limitations. The people have a far more certain and reliable security and protection against mere impolitic, over-stringent, or uncalled-for legislation, than courts can ever afford, in their reserved power of changing, annually and biennially, the representatives of their legislative sovereignty; and to that final and ultimate tribunal should all such errors and mistakes in legislation be referred for correction."

See also, Peo. v. Brooklyn, 4 Comst'k. 440.
Carpenter v. Montgomery, 7 Blackford, 415.
Mosier v. Hilton, 15 Barber, 657.

That our government has stood thus long, that the decisions of this court are respected and submitted to by all parties and by all men, is owing to the fact, that it has, at all times, most scrupulously confined itself to its proper province, and refused to embark in political discussions for party ends. Its aid has often been sought by politicians. It has uniformly been denied, as I shall have occasion to show hereafter. The success of all free government depends upon a religious observance of this division of powers. When this court decides a cause, no matter how erroneous Congress or the President may think the decision, Congress is powerless to grant re-argument or new trial; and if the President does not see the judgment executed, an impeachment will sweep him away as a "cumberer of the ground." When the President grants a pardon, no matter what Congress or this court may think of the propriety of the act, both are bound by it. When Congress determines any political matter, ever so erroneously, in the opinion of this court or the President, its action is final and conclusive. It is far better that individual instances of injustice committed by either department should go unredressed, than that the liberties of all should be swallowed up. The rule is general, that a discretion

committed to one authority is not to be reviewed by another. *Rome* vs. *Rome*, 18 *N. Y.* 42.

No principle has been more repeatedly and emphatically declared by this court.

A. As to the existence or non-existence of a foreign power, the court will follow, and be bound by, the action of the political department.

Rose *vs.* Himely, 4 Cranch, 271.
Gelston *vs.* Hoyt, 3 Wheat., 324.
United States *vs.* Palmer. 3 Wheat., 610.
The Divina Pastora, 4 Wheat., 52.
The Nestra Senora, 4 Wheat., 497.
The Santissima Trinidad, 7 Wheat., 337.
The Nueva Anna, 6 Wheat., 193.

In United States *vs.* Baker, Mr. Justice Nelson says:

"And if this is the rule of the Federal Courts in the case of a revolt and erection of a new government, as it respects foreign nations, much more is the rule applicable when the question arises in respect to a revolt and the erection of a new government within the limits, and against the authority of the government under which we are engaged in administering her laws. And in this connection, it is proper to say that, as the confederate states must first be recognized by the political departments of the mother government, in order to be recognized by the courts of the country, namely, the legislative and executive departments, we must look to the acts of those departments as evidence of the fact. Their act is the act of the nation, through her constitutional public authorities."

B. The acts of the President.

In Williams *vs.* Suffolk Ins. Co., 13 Pet., 420, the court says:

"And can there be any doubt that when the executive branch of the government which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

"If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States, whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.

"In the cases of Foster *vs.* Neilson, 2 Pet. 250, 307, and Garcia *vs.* Lee, 12 Pet. 511, this court have laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive?"

In Marbury *v.* Madison, 1 Cranch. 49, the doctrine is established by Chief Justice Marshall, that in all those matters committed to the discretion of the Executive, that officer is answerable only to impeachment for the manner in which he proceeds. He judges for himself of the exigency of affairs, and no court can review his conclusions. The following language is employed:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases their acts are his acts; and whatever opinion may be entertained of the

manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the Executive, the decision of the Executive is conclusive.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

In the celebrated case, Martin *vs.* Mott., 12 Wheaton 19, this court, speaking of the power of the President under the act of 1795, to call out the militia, "whenever the United States shall be invaded, or be in imminent danger of invasion," &c., by Story, J., says:

"The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of State, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy, these powers must be so construed, as to the modes of their exercise, as not to defeat the great end in view."

"If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, or even safety, might imperiously demand to be kept in concealment.

"If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are: 'Whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call 'forth such number of the militia, &c., as he may judge necessary to repel invasion. The power itself is confined to the Executive of the Union, to him who is, by the Constitution, 'the commander-in-chief of the militia, when called into the actual service of the United States;' whose duty it is 'to take care that the laws be faithfully executed,' and whose responsibility for an honest discharge of his official obligation is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency

in the first instance, and is bound to call forth the militia; his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders will be given to carry the power into effect; and it cannot, therefore, be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since, in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

See also Ashton *v.* Hammond; 3 McLean, 107.

C. The discretionary power of Congress.

In Scott *vs.* Jones, 5 How., 313, the question upon which the decision of this court was sought, was as to the validity of a statute passed by the pretended State government of Michigan before it was admitted into the Union. The court held it had no jurisdiction, and in its opinion, by Woodbury, J., says:

"Indeed, there were, and still are, some of the highest motives of expediency and sound public policy not to entangle this court with the consideration in this way of a matter so PURELY POLITICAL, AND OFTEN SO FULL OF PARTY AGITATION."

Justice McLean delivered an opinion, which was concurred in by Mr. Justice Nelson, asserting the jurisdiction of the court under the 25th section of the judiciary act; but going quite as far as the court in all that is material to this case. He says:

"No act of the people of a Territory, without the sanction of Congress, can change the territorial into a State government. THE CONSTITUTION REQUIRES THE ASSENT OF CONGRESS FOR THE ADMISSION OF A STATE INTO THE UNION; and the United States guarantee to every State in the Union a republican form of government. HENCE THE NECESSITY, IN ADMITTING A STATE, FOR CONGRESS TO EXAMINE ITS CONSTITUTION."

In Cherokee Nation *v.* Georgia, 5 Pet. 1 Marshall, C. J., though deciding the case on other grounds, says:

"A serious additional objection exists to the jurisdiction of this court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence; their right to which the State denies.

"That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect the possession, may be more doubtful. The mere question of right might, perhaps, be decided by the court in a proper case with proper parties. But the court is asked to do more than decide on the title. The propriety of such an interposition by the court may be questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

But the most important case, because the one most directly applicable, is that of Luther *vs.* Borden, 7 How. 1.

During the Rhode Island rebellion the State government proclaimed martial law; and the defendants, without warrant or any authority whatever from the civil authorities, but being enrolled in a regiment

of the State troops, and acting under orders from their superior in military command, broke open the house of the plaintiff. The action was quare clausum fregit. Defence set forth the facts: that a rebellion existed to overthrow the State government; that martial law had been proclaimed; that the defendants were in the military service of the State, and did the acts complained of by order of their military superior.

The case was not brought to this court under the 25th section of the judiciary act, from a State court. The action was commenced in the Circuit Court of the United States sitting within the State of Rhode Island. Therefore, it was the duty of that court, and of this court on writ of error, to decide upon the full merits of the defence, which rested entirely upon the validity of the act proclaiming martial law. The Circuit Court held that the facts set up and relied on by the defendants amounted to justification. That judgment this court affirmed.

The opinion of this court established the following propositions:

1. That the courts of Rhode Island having decided that the charter government was in operation during the time when the acts complained of took place, this court was bound by that decision. But this court expressed its opinion that if no such decision had been made by the courts of that State, the question could not have been tried in the courts of the United States. That the question of the existence of a State government was to be determined by the political department, and not by the courts, which decision was to be followed by the courts.

(2.) That the Constitution of the United States, "as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department."

The court say:

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature, or of the executive (when the legislature cannot be convened,) against domestic violence.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

"So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided that in case of an insurrection in any State against the government thereof, it shall be law-

ful for the President of the United States, on application of the legislature of such State, or of the executive, (when the legislature cannot be convened,) to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.

"By this act, the power of deciding whether the exigency had risen upon which the Government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging; if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes, the acts which it before recognized, and was bound to recognize, as lawful."

3. In regard to the power of *a* State to declare martial law, the court say:

"In relation to the act of the Legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of a State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government; it was intended merely for the crisis, and to meet the point in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. This power is essential to the existence of every government; essential to the preservation of order and free institutions, and is as necessary to the States of the Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there was reasonable ground for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

Again the court say:

"Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to

involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has been decided, the courts are bound to take notice of its decisions, and to follow it."

It is impossible to deny that this decision applies to this subject in several important particulars.

(1.) It settles that the admission of States is matter within the discretion of Congress.

(2.) That this court, in regard to that subject, is bound by the action of Congress.

(3.) That martial law, when properly declared, is justification to those who act under it.

But beyond the mere questions settled, which are conclusive upon so much of the discussion in this case, the opinion of the great departed chief of the court, its arguments and illustrations, its essential principles and pervading philosophy, all seem to have been intended for these times and for this case. The Rhode Island troubles never arose above the dignity of a "rumor of war." The Dorr government expired before the United States could suppress it. As Mr. Webster said, "It came in one day and went out the next." The broad and statesmanlike argument of this celebrated opinion, delivered in a strain of eloquence befitting a prophet of Israel commissioned by Heaven to reveal the methods by which Jerusalem might be defended, and the unity of the Israelitish nation be preserved, finds its appropriate subject in the tremendous rebellion, which for four years shook the foundations of our sovereignty with a power as fierce, and at times as uncontrollable, as that of an earthquake. May not Providence have inspired this court to declare in advance, and by the lips of a southern man, revered of *all* men, those great constitutional doctrines necessary to guard this government against the perils of all subsequent times?

Congress and the President are now engaged in constructing a State government for the State of Mississippi, having first decided that Mississippi has no State government. But if the argument of our opponents be a sound one, the *de facto* government, under the constitution framed by the convention called by the President, is a valid State government, and all these proceedings on the part of the political branches of this government are wrongful, and should be declared void. Suppose this *de facto* government of Mississippi should to-morrow call out troops, if it has any, or proceed to enlist volunteers among the people of Mississippi to sustain its pretensions to sovereign powers; and the President, under the direction of Congress, should move the army of the United States to overthrow that government and enforce the reconstruction acts of Congress. Or, again, suppose the proceedings now in progress to form a State government should go so far as to result in the organization of a government claiming to be the proper and legal State government of Mississippi. Then there would be two *de facto* organizations in that

State, viz: the one resulting from the convention called by the President, and the other resulting from the convention called under the authority of Congress, each claiming to be *the* State government of Mississippi. Is it not apparent that in such case the decision in Luther *vs.* Borden would be directly applicable, and that the one which Congress should recognize would be presumed by this court to be the legal government? Suppose a conflict of arms between the United States and the present *de facto* government, as to the validity of the latter, could this court interfere against the United States, and declare that organization to be a valid State government?

Or suppose, after the congressional State government shall be organized, a conflict of arms should arise between those two State governments, each contending for the supremacy, could this court interfere and control the choice of the political departments as to which of them should be recognized? Or after Congress had decided, reverse its decision, and decide the other to be the rightful government? This would be precisely what this court said, in Luther *vs.* Borden, could not be done. And to quote again from that opinion—it cannot be repeated too often—

"Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet, if this does not reside in the courts when the conflict is raging; if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize as lawful."

And if this court would be bound while the conflict was raging, and after it was over, is it not clear that it is equally bound before it begins?

This question might be brought to this practical test while we are arguing this cause. It may come to-morrow. If it come, Luther *v.* Borden casts a clear light on the path this court must pursue.

In the present posture of affairs the President, claiming that the government established by him is the proper State government of Mississippi—Congress being in the act of establishing another—if anything more be needed to establish anarchy upon a sure foundation, it is for this court to hold that the presidential government is not the true one, and that the congressional one will be no better; but that the old government which existed before the war, *is the best of the three.* And why should not each department of this government have a "State" of Mississippi for its own use? Would not such a happy arrangement completely protect McCardle, and secure him perfect immunity in exercising the most enlarged liberty of slandering the government of the United States and its high military and civil officers? If the presidential or judicial government should attempt to punish him, Congress would move an army to overthrow it. Should the congressional government indict him, this court would deliver him on *habeas corpus.*

II.

There seems to be a disposition, in certain high places to admit the abstract proposition that a court cannot decide upon a *mere* political question; but to insist that in a case between proper parties, where private rights of property or the right of individual liberty is concerned, although depending upon a political question. it may decide such question. This makes it necessary to examine more critically what is meant by saying: *The court cannot decide a political question*?

And here, as in most cases where men agree in the premises and differ in the conclusions of an argument. it will be found that the fault is in the use of inaccurate or ambiguous language. It is not an accurate expression to say that the court cannot decide a case involving a political question. Every court must decide every case which is brougth before it between parties competent to litigate in such court. If for instance A, a citizen of Massachussetts. sue B, a citizen of New York, in the Circuit Court of the United States for the district of New York, such case must be decided when it is reached for trial; that is, a final judgment must be rendered therein for the plaintiff or for the defendant. The case of Luther *vs.* Borden was decided by this court; that is, a final judgment was rendered in that cause by this court, and every question involved in that cause, if not decided in the opinion of the court, was nevertheless embraced in. and precluded by the judgment rendered. All the cases in which the courts have declared the principle contended for involve rights of private property, for no man was ever yet wild enough to seek the aid of a court to restrain the movements of an army, or control the operations of a military campaign.

The strictly accurate expression of this principle would be, that the civil courts, in deciding judicial causes involving a political question, are bound to adopt and follow the decision of such question which has been made by the political power. This court has repeatedly held that, in deciding a cause affecting the title to real estate, it will follow and be bound by the settled rule of decision in the courts of the State in which the land is situated. It would not be correct to say, that in such case, this court could not decide such a question. It must decide it in order to decide the cause; but must decide it in a particular way, without regard to its own opinion of the correctness or incorrectness of such rule of law. So, in this cause, this court must decide every question involved, and must in words, or by its judgment, overrule or sustain every argument made therein at this bar. But, in precise and accurate language, what we claim is, that this court, in deciding this cause, is bound to adopt and follow the decision of the political power upon every political question arising upon this record.

If this were not so, the principle so often and so solemnly announced by the English and American courts would be a mere delusion. What practical benefit could result from such doctrine in

the abstract? How would it tend to promote harmony in the operations of the government, were this court to decide that it could not restrain the movement of our armies against a city of fifty thousand inhabitants, if it were also to decide that it could entertain fifty thousand suits to protect the individual property of each inhabitant? If it be conceded that in case Congress should to-morrow should declare war against the State of New York, and move the army and navy, with hostile purpose, in that direction, this court could not restrain such proceeding, can it entertain a suit in behalf of any or every individual of New York to protect his property from the ravages of such a war? The great doctrine upon which these decisions rest, is that the civil courts of any country are bound, in all political questions, to sustain the action of the political power, without *inquiring* into its justice or injustice. A different course would *divide the government against itself*, and while one branch was levying war, capturing property, and making prisoners, the other would be returning the property on Replevin, and releasing the prisoners on Habeas Corpus. What cannot be done directly, cannot be indirectly. If the court cannot interfere to protect all the citizens of a State against which Congress is levying ever so unjust a war, it cannot do so to protect any one citizen of such State. And if this court cannot interfere while the armies are in the field, it cannot, after peace is established, entertain suits and award damages for injuries committed by the army in its military operations. And here I am reminded how impossible it is to announce any correct principle applicable to this subject, without substantially repeating the opinion of the court in Luther *vs.* Borden.

The Chief Justice, after showing that the court cannot interfere during the continuance of a war, adds: "Yet if this right does not reside in the courts while the conflict is raging; if the judicial power is at that time *bound to follow* the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and *was bound* to *recognize*, as lawful."

It would, indeed, be monstrous to hold that our commanding generals, for refusing to obey the orders of their superiors, and to execute the policy of the war-making power, *into the justice of which they are not permitted to enquire*, (*Martin vs. Mott*, 12 *Wheat.* 19,) are amenable to military punishment, and yet are liable to be mulct, after the war is over, by a civil court's *reversing the decision of the political power.*

If an action be brought in a civil court against General Grant for acts committed by his orders during the rebellion, it must undoubtedly be decided by the court; but whether the court can pass upon the merits of such a question by an exercise of its own judgment, or whether it is bound to decide such question as it has been decided by the political power, must be determined by the answer to another question: Could the court have enjoined such act before it was committed? All judicial rights are harmonious. What one has a right to do, another has no right to prevent. If the government has a right to, and does, bombard the city of New York, a citizen

has no right to complain in a court of justice that his house was by that act destroyed. In a judicial sense, everything is right which the courts are bound to sustain And if the court cannot grant an injunction to save a citizen's house, it is because its destruction is right, so far as the court can determine; and after the war is ended, the court cannot award damages for that which was not, in a judicial sense, an injury, when committed. These views are believed to be sustained by the authorities, in every particular.

In Luther *v.* Borden, Woodbury, Justice, though dissenting upon another point, not material here, said:

"Looking at all these considerations, it appears to me that we cannot rightfully settle those grave political questions which, in this case, have been discussed in connection with the new Constitution; and, *as judges*, our duty is to *to take for a guide* the decision made on them by the proper political powers, and, whether *right or wrong*, according to our *private* opinions, enforce it till duly altered."

In *Foster v. Neilson*, 2 *Pet.* 309, the title to the property in question depended upon the question whether the land was within a cession by treaty to the United States, and this court held itself *bound by the decision* which had been made upon that question by the political branches of the government.

In *Williams vs. Insurance Co.*, 3 *Sumner* 270, which was an action between proper parties to enforce a private right, the court held itself *bound*, in deciding it, *to follow the decision of the political power* as to the jurisdiction of the government of Buenos Ayres over the Falkland Islands, and that no right existed in the court to *review* such decision.

Same case 13 Peters 419.

The celebrated case Elphinstone *v.* Bedrecchund, 1 Knapp, privy council cases, 316, was an action between proper parties, involving title to property. The court held itself bound by the determination of the government as to the propriety of the seizure made by the military authorities.

THIRD POINT.

It is the undoubted right and duty of Congress to aid the loyal people of Mississippi to establish a republican State government for that State; and the United States is now engaged in the performance of that duty.

The Constitution, Article 4, Section 4, provides:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence."

This provision makes it the duty of the United States to "take care" that there shall be at all times a government republican in form for every State; and this, too, without regard to the wishes of a majority of the people of a particular State. If New York should call a constitutional convention, and with all the forms of law pro-

ceed to change the form of her State government to that of a monarchy, submit the new constitution to the people, and it should be adopted unanimously by them, it would still be the imperative duty of the United States to overthrow it, and set up in its place a republican State government.

Federalists No. 43, Madison.

Story Com. con. sec. 1813.

Taney C. J. Luther, *vs.* Borden, 7 How., 45.

So if New York should call a convention, which should resolve to abolish all State government, and submit the proposition to the people, who should ratify it unanimously, it would still be the duty of Congress to take steps to organize a State government for that State; because, in either case, it would be true that there was no republican State government for that State, and the Constitution makes it the duty of Congress to see to it *that there be one.*

In reply to this it may be asked, how could Congress execute this power, if the people of New York would not co-operate to that end; and would a government set up by the United States, and supported by arms, if necessary, *be a republican State government?*

Such a state of things would undoubtedly embarrass the performance of this duty; but it cannot be admitted that Congress would be powerless in the premises, for such admission would concede the power to the people of a State virtually and practically to withdraw from the Union. After the abdication of State government, in the case supposed, the territory over which the "State" had exercised its powers would still be a portion of our dominions, and the people residing upon it would remain citizens of the United States.

What has the United States done in other similar cases? When it finds people residing as a compact community upon a portion of the dominions of the United States, but without local government, it has first established a government—we call such, territorial governments—and has protected the people, and encouraged and aided them when sufficiently numerous, to form a State government to be admitted into the Union. This power has been exercised from the earliest days of the republic, and is familiar, as applied to the *new* territories. All the new States of the great west have been, first, untrodden wildernesses; next, partially settled countries without civil government; then, Territories in the political sense; then, *States in full communion.* It may tend to illustrate the subject in hand to inquire: *Whence does Congress derive this conceded power?*

In Insurance Co. *v.* Canter, 1 Pet., 511, Marshall, C. J., says of territorial courts—and of course the same remarks are equally applicable to the whole territorial government:—"They are legislative courts created in virtue of the general right of sovereignty which exists in the government; or, in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." That case did not require a more definite determination of the question we are considering.

General Cass, in his great speech in the Senate, January 21 and

22, 1850, (*Appendix to Globe, p.* 58,) demonstrated, if human reason can demonstrate anything, that the mere proprietary right, conferred by the Constitution upon Congress to *dispose* of and regulate the "territory and *other* property" belonging to the United States, did not embrace the power of *legislation* over *the people* residing on such territory; especially, as the Constitution, in relation to the ten miles square for seat of government, &c., as to which it was intended to confer such power, had employed the apt and proper expressions for that purpose: "Congress shall have power to *exercise exclusive legislation in all cases whatsoever*, over such district, not exceeding ten miles," &c.

If objection be made to the other source of this power suggested by Chief Justice Marshall—"the general right of sovereignty which exists in the government"—and if all powers of the government must be derived from some specific grant, may not this power reasonably be referred to the power granted to Congress *to admit new States into the Union?* The Constitution is necessarily brief and general in its provisions. It was not designed to be a *code of procedure.* It indicates what powers may be exercised, not the *manner* of their exercise. From the power granted to Congress "to establish post offices and post roads," is implied the right of monopoly in mail carrying, and the power of Congress to maintain the complicated postal system now existing. From the power to admit new States, that is, *new State governments*, into the Union, it seems not unreasonable to imply a power to form a State government to be admitted; and from this again, the power to govern the territory during its infancy, until it shall grow to the stature of a State. There is a strong disposition in our day to maintain that Congress has no power to do anything it never has done; or to exercise a given conceded power in any different manner from that in which it has been exercised; in other words, to define and limit the powers of the government, not by the Constitution, but by what has been the practice under the Constitution. If Congress, in the first instance of a territory which had reached the condition to be admitted as a State, had framed a constitution, and submitted the question to the people to determine whether they desired to be admitted with such constitution, and if decided in the affirmative, Congress had admitted her as a State, and if such had continued to be the practice of the government, would it have been subject to any constitutional objection? And it is evident, that if such a proceeding would have been constitutional in the first instance, it would be equally so now. The course adopted, and hitherto pursued, was such as Congress, in the exercise of its discretion, deemed most advisable under the then circumstances. But if for any reason it is now thought advisable to vary the practice, it is perfectly constitutional to do so. The language of Story's Com. on Const., sec. 430, is applicable here: "It must be obvious, that the means of carrying into effect the objects of a power may, nay, *must be* varied in order to adapt themselves to the exigencies of the nation at different times. A mode efficacious and useful in one age, or under one posture of circumstances, *may be wholly vain*, or even mischievous,

at another time. Government pre-supposes the existence of a perpetual mutability in its own operations on those who are its subjects; and perpetual flexibility in adapting itself to their wants, their interests, their habits, their occupation, *and their infirmities.*"

Wherever Congress finds inhabited territory within the limits of the United States without civil government, it may take steps to form a State government for them, to be admitted into the Union. And what difference can it make, *in such a case*, whether they have never had a local government, or once had one which they have since abandoned or destroyed? It is the fact of *such people being without such government*, and not the time or circumstances at, or under, which such state of things *came to exist*, that gives Congress jurisdiction.

Therefore, in the case supposed, of New York's abandoning its State government, it would be as clearly the duty of Congress to interfere to preserve the peace, to restrain and punish crime, to protect property and the personal rights of that people, as it would be, if so large a territory, inhabited by so many people, were found west of the Rocky Mountains. This power being in Congress, it may be carried into execution, and its objects be secured. If it cannot be done in one way, it may be in another; *for it may be done.* Wisdom would, indeed, dictate that in such case a government should be instituted as nearly in accordance with the former government of such State as would be consistent with the accomplishment of the end in view. It should be as *civil* in its form as practicable; as *military* as might be necessary to insure obedience. And such government might be supported by arms, if necessary, until such time as the people of New York should come to a better mind, and seek restoration to their rights in the Union. It is totally denied, that if the people of New York were mad enough and wicked enough to throw off all civil government and attempt to turn that State into a *pandemonium*, that the United States would have no right to interfere to restore order and preserve the peace. *Such right would spring from the necessities of the case, from the nature of things, from the absolute impossibility of executing federal laws in that great community turned loose a prey to anarchy and crime.*

It will be said this cannot be so, because such a power might be abused and made a pretext for destroying any State in the Union. True. But how often has this court overruled that argument; and said that by such reasoning the existence of every power granted by the Constitution might be disproved: that there is no power that may not be abused.

FOURTH POINT.

The grant of power to "guarantee a republican form of government" to the States of the Union, not being restricted by the Constitution, as to the means to be employed to execute the power, Congress is the EXCLUSIVE judge of what means are necessary in a given case.

I.

The Constitution was ordained to establish a government. The powers granted are sovereign powers. Within the field of federal power, Congress, except as restrained by the Constitution, is omnipotent. The acts of Congress, passed in pursuance of the Constitution, are supreme laws, and there is no power on earth that can annul them. When the Constitution empowers Congress to do a certain thing, it is the exclusive judge of the means to be employed, and may employ any means it deems appropriate to accomplish the end, unless restrained, in that particular, by the Constitution. When a power is granted in general terms, with no restriction upon the means to be employed for its execution, those means cannot be restricted by limitations placed by the Constitution upon the exercise of other powers. General provisions in the Constitution must not only be explained and defined, but located.

(Gilman *v.* Sheboygan, 2 Black, 513; Cantwell *vs.* Owens, 14 Md., 215.)

When, therefore, the Constitution says, in effect, no man shall be tried for his life, except by a jury, and before a judge holding his office during good behavior, it is regulating the exercise of the judicial power conferred by the 3d article of the Constitution. This is, therefore, no limitation upon the power of Congress to govern the Territories. When the Constitution says no man's property shall be taken without compensation *first* made, this is a limitation upon the exercise of the right of eminent domain in times of peace, not a restriction upon the war power of the nation. The loose, popular discussions in newspapers and periodicals, during the war, of the most delicate rights and powers of sovereignty, have tended to confuse the public mind, and their harmful influence is experienced in the discussions of Congress, and at the bar of the courts.

One set of men say, for instance, the war power is "outside the Constitution;" others say that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances."

This is merely wrangling in words. Could both classes be cross-examined, after the Socratic method, it would be discovered that all entertain the same sentiment.

They who say the war power is outside the Constitution would not maintain that, during a war, the United States could grant titles of nobility, or that a State could coin money or emit bills of credit. Nor would the others maintain that during the active operations of a

campaign a citizen's land might not be taken for a camp or battle-field, or his house for a hospital, without compensation first made; or that rebels under arms and in battle array might not be slain, without a grand jury to indict, and a petit jury to convict. The Constitution, so far as it relates to civil administration, remains in force, as to civil administration, during the war. But the fact is, that with a single and trifling exception—"no soldier shall. in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law"—the Constitution contains no restrictions whatever upon the war power.

To illustrate, the Constitution, 5th amendment, provides, "Nor shall private property be taken for public use without just compensation." The courts by construction have added compensation to be first made. Now, suppose the army of the United States ready to march upon a rebel army in Virginia or in Massachusetts. The very first necessity to arise might be to take possession of some citizen's farm for a battle-field, or to construct a fort, or perfect other means of assault or defence. The commanding general issues his orders accordingly; but the owner applies to a federal judge, showing the order of the general, stating the probability that his house will be destroyed, or other irreparable injury done, if his farm or plantation shall be selected and occupied for military operations, and pointing out the provision in relation to the taking of private property for public use, says that no compensation has been made or tendered, and prays an injunction.

The question is not, what would be the probable result of such a proceeding. Who would serve the writ, or how it could be enforced, or whether a commanding general would forego a favorable opportunity to give battle, out of respect to a parchment under seal. But the question is, whether any judge out of Bedlam would grant such a writ? The answer to such an application, and to the constitutional argument involved in it, would be, that the provision referred to was intended to regulate the exercise of the right of eminent domain, in times of peace; and was not intended as any limitation upon the power to make and prosecute war. Let such a decision be announced by the judge to whom the application should be addressed, and one man would say, "there, I told you the war power was outside the Constitution;" no, says his opponent, more guarded in speech, "the Constitution is equally in force in times of peace and times of war; but the provision referred to does not apply in case of war." So, too, if the rebel army, finding itself worsted in a fight, should hoist a banner containing a formal plea in bar, reciting that although true it was that they had committed treason, nevertheless treason was an offence to be punished by the civil law, on indictment of grand jury, and after conviction by a traverse jury; the commanding general of our forces, if he were a good constitutional lawyer, would reply: "True, such are your rights, when on trial in a federal court; but that provision was not intended to regulate the proceedings on a federal battle-field." These provisions of the Constitution are not expressed to be in force in peace and suspended in war. But they

are in force, in peace or war, as to their proper subject matter. Land could not be condemned for a post-office, in times of war, without compensation first made. But the constitution was framed upon the supposition that they who would administer it would be possessed of common sense. If so, it was unnecessary to add to the provision, "nor shall private property be taken for public use without compensation," (first made,) the proviso, "this provision shall not extend to cases of necessary and temporary occupation by the army in times of active military operations."

The truth is, the Constitution is the chart of civil government. It defines the powers, and regulates their use, so far as deemed expedient, to be exercised by civil officers. It recognizes the fact, that wars, foreign and domestic, may assail the State; and that it may be necessary to resort to arms to vindicate public rights or the national honor. Therefore it provides that Congress may declare war; that it may raise armies; that the President shall be Commander-in-Chief. But there, from necessity, the Constitution stops.

It would be as absurd for a constitution to provide how a war should be conducted, what means might be resorted to, and what special ends aimed at, as it would be to attempt to regulate the operations of the storms, or control the march of an earthquake. While the Constitution is respected, civil war is impossible. When civil war exists, it is certain that a portion of our people have thrown off the authority, and are disobeying the provisions of the Constitution. The insurgents resort to force, to overthrow the government; the government resorts to force, to reduce the rebels to obedience. This is a state of war. Both parties appeal to arms, to accomplish their purposes. As to this contest, when the army comes, in the law, (constitutional and statutory,) goes out. To provide in, a constitution that although rebels should do anything within their physical power, the government should only do certain prescribed things, would be forming a constitution which in times of war would "give aid and comfort" to its enemies.

Had the Constitution attempted to prescribe what measures should, and what should not, be lawful in war, nothing would have been more likely to be forbidden than the liberation of slaves. Yet in our late struggle, in the opinion of a large majority of our statesmen, that measure became absolutely necessary to the success of our arms. Conceding the soundness of this opinion, such a provision in the Constitution, had it been respected, would have secured the overthrow of the government. When this gigantic rebellion burst out, and civil war was forced upon the government, the constitutional creed for the hour was exceedingly brief. "This government has a right to be. Congress has the power to raise and equip armies. The President is commander-in-chief, and must enforce the laws." In every other respect the Constitution was wisely silent. How the campaigns should be prosecuted; when battle should be given or declined; what towns should be spared and what reduced to ashes; what States should be invaded; what extent of injury inflicted; whether Grant should give Lee and his army no quarter, or with

chivalric generosity, accept his surrender and release him on his parole of honor; whether Sherman should destroy Atlanta, burn Columbia, or restore to the beseeching clergyman "his Indian pony," were matters which the Constitution left to the discretion and judgment of those who should have such details in hand. The end—the supression of the rebellion—was lawful; the means for its accomplishment, unlimited.

II

The general principle that where a power is vestedin Congress, it is to be the exclusive judge of the means to be employed to carry it into execution, provided the Constitution contains no restriction upon the means, is a familiar principle.

United States *vs.* Fisher, 2 Cranch 358.

In People *vs.* Fisher, 24 Wend., 220, the court, by Bronson, J., say: "The argument in favor of the deputy necessarily concedes that the Constitution leaves it open to the legislature to supply the place (the office of clerk) until the people can conveniently exercise their privilege, (by election.) And if the legislature may supply the place in one way, I do not see why it may not in another, for the Constitution says nothing whatever on the subject. It is said, however, that the statute giving the appointment to the central power, though not against the letter, is contrary to the spirit of the Constitution, and therefore void. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation, under the notion of having discovered something in the spirit of the Constitution upon a subject which is not even mentioned in the instrument."

See also, Grant *vs.* Courter, 24 Barber, 232.
Morris *vs.* People, 3 Denis, 381.
People *vs.* R. R. Co., 34 Barber, 123.
Affirmed S. C., 24 N. Y., 485.
People *vs.* Gallagher, 4 Gibbs Mich., 244.

"Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper, and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the Constitution to prohibit or restrain the exercise of legislative power."

Stuart *vs.* Laird, 1 Cranch, 299.

1 Story, Com. on Const., sec. 430.

"In the interpretation of a power, all the ordinary and appropriate means to execute it are deemed a part of the power itself. This results from the very nature and design of a constitution. In giving the power, it does not intend to limit it to any one mode of exercising it, exclusive of all others. It must be obvious (as has been already suggested) that the means of carrying into effect the objects of a power may, nay, must be varied in order to adapt themselves to the exigencies of the nation at different times. A mode efficacious and useful in one age, or under one posture of circumstances, may be wholly vain, or even mischievous at another time. Government pre-supposes the existence of a perpetual mutability in its own operations on those who are its subjects; and perpetual flexibility in adapting itself to their wants, their interests, their habits, their occupation, and their infirmities."

In Martin *v.* Hunter, 1 Wheat. 326, this court says:

That "where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication."

Again: "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended merely to provide for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new

changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present might seem salutary, might in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."

Again, page 344 : "The argument urged, from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere. Wherever it may be vested it is susceptible of abuse."

Again, page 349 : "If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power ; and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control."

Again, page 351: "On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the State courts ; and that the 25th section of the Judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation, where the people have not been disposed to create one."

See also, Gibben *v.* Ogden 9, Wheat, 1.

Gilman *v.* Philadelphia, 3 Wallace, 725.

In Rome *v.* Rome 18, N. York Reports 38, 41, the court say:

"The Constitution (Art. 8, sec. 9.) provides that 'it shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations.'

"Now, from this provision, it is plain that the convention thought there had been, and might be, abuses in respect to the exercise of the named powers of municipal corporations. They, therefore, enjoined upon the legislature the task of restricting these powers so as to prevent the abuses. But it is manifest from the terms of the provision that these powers were, in some cases at least, and to some extent, still to exist ; for the direction is neither to abrogate existing powers, nor to abstain from creating new ones, but only to restrict them so as to prevent abuses in assessments, and contracting debts. Indefinite as is the rule of restriction prescribed by this provision, and ill-suited in its terms to be judicially applied, it is still both salutary and well suited to be the guide of legislative discretion. It presents to the legislature the general object to be attained, the prevention of abuses in assessments and contracting debts, and the general means of attaining that object, by restrictions on the powers to be conferred on municipal corporations ; but it leaves to the discretionary power of that body the determination of what are abuses, and what extent of restriction, on the powers to tax, to lay assessments, to borrow, to contract debts, to loan credit, will prevent such abuses. The legislative judgment is appealed to, and is to be formed while they are deliberating upon the enactment of the law. Each particular case is to be determined on its own circumstances, as to the measure of restriction necessary to secure the end proposed. Restrictions which, as to one municipality, would suffice, as to another might be altogether insufficient. To each case they are to apply a limit of power which will, in their judgment, prevent abuse. If their judgment has been in any particular case erroneous, if the limit which they deemed sufficient has proved not narrow enough to exclude abuses, surely their judgment is not to be reviewed and reversed in a court of law. The rule is general, that a discretion committed to one authority is not to be reviewed by another. It holds, in regard to tribunals even of the most limited power, and it applies at least with equal force when the depositary of the discretion is also the depositary of the legislative power of the State.

" I conclude, therefore, that the provision in question does not set forth any rule by which a court can adjudge an act of the legislature to be void. The rule was intended to act upon the conscience and judgment of the legislature in passing laws, and we must assume that the law in question was enacted by them in view of it, and of all the responsibility which it imposed, and that, in the legislative judgment, this act did so restrict the powers in question as to prevent abuses."

This court in McCulloch *v.* Maryland, 4 Wheat. 316, Marshal C. J., says:

"The subject is the execution of those great powers, on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any, which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means, by which government should, in all future time, execute its powers would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies, which if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity, to avail itsself of experience to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation, that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established, taxes may be imposed and collected, armies and navies may be raised and maintained, and money may be borrowed without requiring an oath of office. It might be argued with as much plausibility, as other incidental powers have been assailed, that the convention was not unmindful of this subjection. The oath which might be exacted, that of fidelity to the Constitution, is prescribed, and no other can be required. Yet he would be charged with insanity, who should contend that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest.

"So, with respect to the whole penal code of the United States Whence arises the power to punish, in cases not prescribed by the Constitution? All admit that the government may legitimately punish any violation of its law; and yet, this is not among the enumerated powers of Congress. This right is to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. The several powers of Congress may exist, in a very imperfect state to be sure, but there may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

"Take, for example, the power to establish post offices and post roads. This power is executed by the single act of making the establishment But from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to convey the mail and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record, or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

"The baneful influence of this narrow construction, on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution and from our laws.

"The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise."

III.

Instances of the application of these principles in particular cases, are not wanting.

1. The Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and Inferior Courts, shall hold their offices during good behavior," &c.

Yet this court has held, and the practice of the government for a quarter of a century has conformed to that theory, that the courts of the Territories created by Congress, need not be composed of judges holding their offices during good behavior.

This question came before this court in American Ins. Co. *v.* Canter, 1 Peters, 511, in regard to the territorial courts of Florida. This court by Marshall, C. J., says:

"We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that the judges both of the Supreme and Inferior Courts shall hold their offices during good behavior. The judges of the Supreme Court of Florida hold their offices for four years. These courts, then, are not Constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States [in the courts of the United States in the States,] in those courts only which are established in pursuance of the third article of the Constitution the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and of a State government."

In Benner *v.* Porter, 9 How. 242, this court says: "The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments; and, consequently, no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. *They are legislative governments, and their courts legislative courts. Congress, in the exercise of its powers in the organization and government of the territories, combines the powers of both the Federal and State authorities.*"

2. The Constitution provides, Sec. 4, Art. 2, "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Mr. Grundy, Attorney General, (Opinions, vol. 3, p. 409,) held that territorial judges were not impeachable under this clause of the Constitution, because they were not constitutional, but merely statutory officers.

Mr. Crittenden, Attorney General, (Opinions, vol. 5, page 288) held that the President had the power to remove the chief justice of the Supreme Court of the Territory of Minnesota, for the reason that he was not a constitutional judge.

3. The provisions of the Constitution in regard to jury trials are the following?

"The trial of all crimes, except in cases of impeachment, shall be by jury." Art. 3, Sec. 2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." 6 amendment.

The first provision is a part of the second article as originally adopted, defining and regulating the exercise of the judicial power of the United States, in the courts of the United States, composed of independent judges holding their offices during good behavior. The clamor that was raised against the Constitution, in this respect, by those who opposed its ratification, and which led to the amendments subsequently adopted, had no reference to the government of the Territories, or to any other special or exceptional case. It related solely to the exercise of the judicial power proper of the United States, in its courts.

Now, is it not manifest, that if Congress may establish a territorial court composed of judges holding their offices for a limited term, as four years, upon the ground that such court is a mere creature of Congress, created in the exercise of special powers conferred by the Constitution to govern the territories, that it may also, if it please, provide that certain crimes may be tried in those courts without a jury?

The case of Webster *vs.* Reid, 11 How., 460, is not opposed to this position. In that case, an act of the territorial legislature denying a right of trial by jury was held void, as being in conflict with the organic law of the Territory, which extended the Constitution of the United States and the *laws of Congress* over the Territory.

"The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior * * The trial of all crimes, except in cases of impeachment, shall be by jury." Can any reason be suggested why Congress may create territorial courts in disregard of one of these provisions and not the other; or why a constitutional jury must be empanneled in a statutory court?

If Massachusetts were to pass a law to-morrow, denying a trial by jury to any man indicted for crime, and her courts should sustain it, this court could grant no relief. Such a law would not be in violation of the Constitution of the United States, because the Constitution of the United States relates only to the exercise of the federal judicial power.

Barron *v.* Baltimore, 7 Pet., 243.
Smith *v.* Maryland, 18 How., 71.
Pervier *vs.* Commonwealth, 5 Wallace, 475.
Charles River *vs.* Warren Bridge, 11 Pet., 540.
Mils *vs.* St. Clair Co., 8 How., 569.

And this Court cannot declare a State law void because it conflicts with the State constitution.

Withers *vs.* Buckley, 20 How., 84.
Porter *vs.* Foley, 24 How., 415.
Jackson *vs.* Lamphier, 3 Pet., 280.

It follows that the legislation of Congress in regard to trial by jury in a Territory, *for offences against territorial laws*, is as far beyond the reach of this court, as would be the same legislation by a State, in a matter of municipal concernment.

Fifth Point.

The act of Congress of March 2, 1867, with its supplement, the act of March 23d, 1867, regarded as embodying the means adopted by Congress for establishing a State government in Mississippi, VIOLATES NO PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

The precise question, and the only one before the court, is whether the act is unconstitutional, in authorizing a trial of the appellant before a military tribunal, for a *breach of the peace*. No other question arises upon this record. The validity of the Congressional plan, in other respects, is not before the court. McCardle complains that he is illegally imprisoned; a writ of *habeas corpus* is issued to inquire into the fact; the authorities having him in custody bring him into court, and set forth the cause and manner of his imprisonment; and the only question is, whether the provision in the reconstruction act which authorizes his arrest and trial for this offence, in this manner, is constitutional. If so, the appellant will be remanded. If not, he will be released; but the validity of other provisions of the act, not affecting the appellant's rights, as presented by this record, is not before the court, and I shall not discuss those provisions, nor the general policy or political wisdom of the Congressional plan. That is proper subject of debate in Congress, which has power to change the system; is proper subject for discussion or declamation on the stump, before the people, who have the power to change Congress, and thus change the political policy of the government upon this subject. But these are "purely political" questions, the discussion of which in this court, in private causes, has so frequently been reprobated.

In all the arguments in this court in relation to the reconstruction acts, so far as I have seen the report of them, and so far as I can gather from the printed briefs and arguments filed in court, the principal objection made to their validity is, that they authorize citizens to be tried without a jury. And if we can overcome this objection, in face of all the prejudices of our people in favor of such trial in all cases, we do substantially answer every objection that can be made to these acts. No objection that I have heard rests upon better grounds, or is more likely to find favor with courts, or with the people. Before proceeding to discuss this question, I must pay my respects to—

THE MILLIGAN CASE.

It has been claimed in popular discussion that this decision shows the opinion of five the judges of this court to be, that the reconstruction acts are unconstitutional. A very slight examination will set this pretence at rest. Milligan applied to the Circuit Court of the

United States for the district of Indiana for a writ of *habeas corpus*, to obtain his release from alleged illegal imprisonment. The petitioner filed with his petition the order for the commission, the charges and specifications; the finding of the military tribunal against him; the approval by the President of sentence of death which had been passed upon him. The petitioner was a citizen of the United States a citizen of Indiana, where he had resided for twenty years; the State government of Indiana and the civil courts of the United States, within that State, were in the unobstructed exercise of all their powers; the State was not suffering invasion; had never been engaged in rebellion; and was represented by Senators and Representatives in Congress. The petitioner had been tried and convicted by a miltary tribunal, of an offence punishable by the laws of the United States in the courts of the Union, and these courts were open to try him. The offences charged were capital; the punishment death.

"Milligan claimed his discharge from custody by virtue of the act of Congress relating to habeas corpus, and regulating judicial proceedings in certain cases, approved March 3d, 1863."

THE DECISIÓN.

This court decided (AND ALL THE JUDGES CONCURRED IN THE DECISION) that no act of Congress authorized the trial of Milligan, by a military tribunal, in the State of Indiana, on the charges made against him; that his imprisonment under sentence of that tribunal was illegal, and that he ought to be discharged. No act of Congress was pronounced unconstitutional. On the question, what would have been its effect, if Congress had passed a law providing for such trial, (all the judges holding that Congress had not even attempted to pass such an act,) five judges expressed an opinion that it would have been void, and four, that it would have been valid.

THAT CASE HAS NO APPLICATION HERE.

What possible application can the decision or the opinion in that case have upon this?

(1.) Indiana was in the Union. Mississippi is out.

(2.) Indiana had a State government. Mississippi has none.

(3.) Congress had passed no law authorizing the trial of Milligan by military tribunal for inciting rebellion. Congress has passed a law authoriziug such trial of McCardle for breach of the peace.

(4.) The offence charged against Milligan was triable in the United States courts of Indiana. The offence charged against McCardle was not triable in the United States Court of Mississippi.

(5.) Congress recognized the State government of Indiana, and did not pretend to be exercising the power in that State of forming a State government. Congress has decided there is no State government of Mississippi, and is in military possession there, and actually proceeding with the formation of a State government.

If there be even one essential element common to the Milligan and

the McCardle cases, or one point in that opinion that precludes any point made in defence of the reconstruction acts, I am unable to perceive it. I shall, therefore, proceed to consider the constitutionality of these acts, undisturbed by the ghost of Milligan.

I.

There is no power given by the Constitution that is more unlimited, or less trammeled with conditions, as to the manner of its exercise, than this. There is no subject committed to the discretion of Congress, as to which it would have been more difficult, at the time the Constitution was adopted, to foresee and provide against the various phases which the evil to be prevented might assume. One State, corrupted by the intrigues of a foreign power, might attempt to establish a monarchical form of government; another, from weariness under the burthens of self-government, might abandon its State organization altogether. As the precise form in which the evil might present itself could not be foreseen, so it would have been folly to prescribe the precise treatment to be applied. The end was pointed out, the power to secure that end vested in Congress; and all else was left—necessarily had to be—to the discretion and judgment of Congress.

Therefore Congress is not confined to any particular course of proceeding, but may adopt any appropriate means to establish a State government for Mississippi. The act in question embodies the means Congress has adopted. This act has no reference to the judicial power, proper, of the Union. Congress is here legislating in regard to a special case committed to its management and sovereign—that is unrestricted—discretion. Here, as in cases of legislating for a Territory, it may, if it deem it expedient, provide for the trial of offences by other tribunals than courts composed of udges holding their offices for life: Here, as there, it may dispense with jury trials in particular, or in all, cases. The act is designed, as it shows on its face, for a special emergency. No permanent government under the act is intended, or will be experienced, unless the people of Mississippi prefer military to civil government, and make the continuation of military rule necessary by thwarting the efforts of Congress to establish civil government. The language of Taney, C. J., Luther *v.* Borden, 7 How. 45, is directly applicable here:

"Unquestionably a military government, established as the permanent government of a State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority."

The United States enters upon the duty cast upon it by the rebellion of the people of Mississippi, to aid the people in setting up a republican State government. Necessarily this requires time. Now, the question is, while Congress is erecting civil government, providing for a constitution which shall ordain and establish a regular

course of civil administration in courts of justice, with jury trials, and all the other usual safeguards of liberty, is it constitutional for Congress to prescribe a summary method of dealing with disturbers of the public peace and criminals? One of two things is certain; either such provision must be made, until such time as a legal State government can be put in operation; or, during that *hiatus* of civil authority there can be no protection for life or property. Congress has said by the act in question, "we will, as speedily as possible, establish a civil government; but while we are accomplishing that desirable end, we will provide, by the only means the nature of the case admits of, to restrain murder, larceny, breach of the peace, and other crimes, which by the usages of every State of this Union, and every Christian nation, are punished in some way."

But McCardle says: "That is unconstitutional. I am entitled to all the benefits of a civil government before you can establish one. I am entitled to a jury trial before a court can be created to empannel one. Or, failing in that, from the impossibility of the case, I am entitled to murder my neighbor, or burn his house, or counsel resistance to federal authority in the act of creating a State government, and you cannot prevent it; because, (1) you cannot punish me in the courts of the United States, as they have no jurisdiction of such offences; and (2) you cannot, by military tribunal, for that is unconstitutional."

If McCardle is released from imprisonment by this writ, this law and logic will be established by the Court. This court, to sustain McCardle's case, must meet and take the responsibility of saying, that if the people of a State destroy their State government, that, even after the United States enters upon the task of reconstructing a new State government, but before the necessary measures can ripen into consummation, and the newly created State government can be organized and enter upon its duties, no murderers can be imprisoned, no crime punished; and that if Congress attempts to protect the people of such State by a military supervision, *ad interim*, the courts of the United States will interfere and release the prisoners held in military custody. It may well be said, in the language of the great Chief Justice in the case I have so often quoted from:

"If the judicial power extends so far, the guarantee contained in the Constitution of the United States, is a guarantee of anarchy and not of order."

II.

But again, every body will admit, that if the United States is bound by the Constitution to construct a state government for the people of Mississippi, then it may do whatever is *necessary* to accomplish the purpose. What is or is not necessary, must be determined with reference to the circumstances under which the power is to be exercised. Before it became necessary for the United States to interfere to set up a State government in Mississippi, society must have been in a disorganized state, and possibly a portion of her people may not feel like giving a cordial support to the proceedings of the United

States in rebuilding the government which they have destroyed. It may be that this ill feeling exists to such an extent that nothing short of actual military occupation of that State can enable the United States to discharge this duty. It may be so bad, that it is absolutely necessary to proclaim martial law there until such time as a civil government may be organized. It may be that real danger exists of armed rebellion and another civil war. It may be, in other words, that it is absolutely necessary in order to set up such a government, that Mr. McCardle should be compelled to desist from counseling resistance to national authority; and from denouncing the high military officials of the United States, men bearing the brightest names in our military history, as "satraps," "autocrats," and "infamous, cowardly, and abandoned villains."

I admit that the people of Mississippi should not be deprived of the pleasure of reading such argumentative and philosophical productions as McCardle has indulged them with, unless it is absolutely necessary. But if it has come to a choice, whether the United States shall execute its duty of creating a new State government there, by the restraint of Mr. McCardle, and the suppression of his "elegant English" for a few days; or whether Mr. McCardle should publish what he pleases, and the measures of the government be thereby frustrated and rendered abortive; then, probably, the people of Mississippi would, of the two, prefer a State government, to McCardle's newspaper. And what I maintain upon this point is, that Congress is the proper body to determine whether it be necessary to the accomplishment of this constitutional purpose, to lay hands on McCardle; and that Congress having decided in the affirmative, this court is bound by that decision—judicially compelled to act upon the presumption that Congress has acted from a sense of constitutional duty, and decided wisely.

In De Camp *v.* Eveland 19 Barber 86, the court says: "Every reasonable doubt is to go in support of the action of the legislature. They may have acted unwisely, but it is not for the courts to inquire into the wisdom or expediency of their conduct. It is a simple question of power, which power is to be presumed, and unless clearly shown to be wanting, its exercise, no matter how objectionable, is to be upheld."

See also Baltimore *v.* State 15. Md. 376.

In passing upon a matter within its exclusive jurisdiction, Congress has decided (by passing this law) that the duty of creating a State government for Mississippi cannot be performed without this temporary exercise of military supervision.

Should this court, in this cause, decide that such military supervision cannot be exercised;

Then it would result from the decisions of both departments of the government, the political and the judicial, each acting upon a subject-matter as to which it is supreme;

That the United States cannot perform this duty at all;

And this under a Constitution which says "the United States shall" perform it.

But fortunately the Constitution has not specified the precise means to be employed. It has said it shall be done; and if there is but one way to do it, and so Congress has determined, then the Constitution says it shall be done that way; for it *shall* be done.

III.

MARTIAL LAW.

It is claimed by some in declaiming against the reconstruction acts that they amount to a declaration of "martial law," and that the people of Mississippi are now being ruled by the arbitrary will of a commanding general.

If this were a fact, I have already shown by the decisions of this court:

1. In Insurance Company *vs.* Conter, 1 Peters, 546, that in legislating for the Territories—and the same principle applies here—"Congress exercises the combined powers of the general and of a State government;" and

2. In Luther *vs.* Borden, 7 How. 45. That in the proper case a State may declare martial law: "That if Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this court can question its authority."

That this language was held in a cause originating in the Federal Court for the district of Rhode Island.

3. I have shown by repeated decisions, that where a power is lodged in the political department to be exercised when the emergency demanding it shall arise, that that department is the exclusive judge of the existence of such emergency; and its determination cannot be reviewed in the judicial courts.

From these premises, if it were true that Congress had declared martial law in Mississippi, where no State government exists, and where the United States, as an incident to the performance of this constitutional duty, is exercising the combined powers of the general and a State government, I should claim that this court could not interfere. That martial law may properly be proclaimed by Congress when the existence of the government, or the exercise of its legitimate powers depend upon it, and that if Congress had declared it, this court could not review their action. The jurisdiction to decide a question, involves the power to decide it, "right or wrong" so far as power is concerned; and if this court could not review the determination of Congress in a doubtful case, it could not in a case where Congress had clearly erred, or wantonly abused its power. Such jurisdiction in this court would be purely appellate in its nature; and no such power is given to this court over the purely political proceedings of Congress. The appeal in such case is to the people, not the courts; because the courts are bound to follow the decision of the political department, and are precluded from inquiring whether it be correct or not.

But for the purpose of showing that the act in question bears no resemblance to a declaration of martial law, it is only necessary to inquire—

WHAT IS MARTIAL LAW?

Military law and martial law, though distinct as fire and water, and sustaining about the same relation to each other, are spoken of

as though the terms were synonymous. Courts martial, whose province it is to try offences against military law only, and which ought therefore to be called courts military, or in our idiom, military courts, are popularly supposed, from their name "courts martial" to be created for trying those offences which consist in resisting the military orders of the commanding general during the continuance of martial law. The very term "martial law" is itself a misnomer, and calculated to mislead. The state of things intended when we speak of martial law, being the suspension and temporary absence of all law, civil or military; and the substitution of the arbitrary will, the absolute despotism or dictatorship of the commanding general. These are unpalatable terms in a republican government; but if we are ever to reach sound results, we must face unwelcome truths, and employ language that conveys an exact as well as truthful meaning.

Martial law is the suspension for the time being of all constitutions and civil laws, the closing of common law courts, and the forcible inauguration of a new, temporary, arbitrary system of administering justice; and is to be justified in a political sense, by the overwhelming necessities of the case.

It may be premised that martial law in England is regarded with as great jealously as in this country.—Magna Charta, Sec. 39, provides:

"No freeman shall be taken or imprisoned, disseized, or outlawed, or banished, or in any way destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

The mutiny act of 1689, which has been re-enacted at every annual session of Parliament for more than one hundred and seventy-years, contains the following declaration:

"Whereas no man may be forejudged of life or limb, or subjected to any kind of judgment by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm," &c.

It is impossible to conceive of any doctrine more ineradicably engraven upon the constitution and civil policy of England than this right of habeas corpus, and exemption of the subject from the operation of martial law.

But notwitstanding this clear provision of the Magna Charta, as often as it is necessary martial law is proclaimed. In the riots of 1780, after the mob had insulted the majesty of parliament, and burned the residence of the Chief Justice, the king in council issued his proclamation:

"We have therefore issued the most direct and effectual orders to all our officers, by an immediate exertion of their utmost force, to suppress the same."

After which the Adjutant General issued orders to the army as follows:

"In obedience to an order of the King in council, the military are to act without awaiting the direction of the civil magistrate, and to use force for dispersing the illegal and tumultuous assemblies of the people."

In the subsequent debates in parliament, the conduct of the King was approved.

During the Irish Rebellion in 1798, Lord Camden, Lord Lieutenant of Ireland, proclaimed martial law, which existed a year without any legislative action; and after that, the Irish Parliament sanctioned the act. In 1801, after the Union, this subject came to be discussed in parliament; and a bill was introduced to continue martial law in Ireland. In this debate, both those who approved and those who opposed the bill, conceded the duty of the executive government to proclaim martial law when necessary.

Sheridan, opposing the bill, said:

"In case of rebellion or invasion, His Majesty has, by virtue of his prerogative, a right to martial law."

Lord Castelreagh, for the bill, said:

"I perfectly understand that the prerogative of the crown authorizes those acting under its authority to exercise martial law. I maintain that it is a constitutional mode for the executive government to exercise martial law in the first instance," etc. ° ° °

"The only circumstance in mind is whether, if the necessity exists, this is the proper remedy? If it be so, we ought not to take alarm at a departure from principle, which is necessary for the preservation of the Constitution itself."

Sir L. Parsons, opposing the bill, said:

"He thought the measure unnecessary. The executive government could resort to martial law if it was necessary to suppress rebellion."

Mr. Gray, opposing, said:

"It was better that the executive government should resort to what has been called (he thought not legally) its prerogative of proclaiming martial law. That was no prerogative of the crown, but rather an act of power, sanctioned by necessity, martial law being a suspension of the King's peace. But it was better that martial law should proceed from the executive government, in urgent moments, than be the work of the legislature on every slight pretence."

In the rebellion of Ceylon in 1848, the governor proclaimed martial law, and tried and executed many rebels. His conduct was severely criticised in England upon the ground that it was unnecessary; and in an able review in the Quarterly, vol. 83, page 127, it is said:

"We shall define martial law to be the law of necessity or defence. The right which a governor of a colony has to proclaim martial law over his subjects, may be said to bear a close analogy to the right which an individual, in absence of legal protection, has to slay an assailant. It both cases the evil must be grave. In both cases all regular means of defence must be exhausted, or beyond reach before the aggrieved party resorts to extremities. In both cases the burthen of proof lies on him who has ventured on such an expedient, and if he fails to vindicate himself, he is liable to severe punishment."

1 Hallam, Const. Hist., p. 240, says:

"There may indeed be times of pressing danger, when the conservation of all demands a sacrifice of the legal rights of a few; there may be circumstances that not only justify, but compel, the temporary abandonment of constitutional forms. It has been useful for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction. And this anomaly, I must admit, is very far from being less indispensable at such unhappy seasons, in countries where the ordinary mode of trial is by jury, than where the right of decision rests in the judge."

In a very able article in the 45th vol., Lond. Law Mag., p. 208, the writer says:

"To preserve the constitution from destruction by tyranny, the subject appeals to force and arms in one case; to preserve the constitution from destruction by riot, rebellion, or insurrection,

the executive appeals to force and arms in the other. Each case, it appears to us, is equally incapable from the nature of it, of being limited, defined, or even stated a priori; the circumstance in which either right may arise cannot be told; necessity alone must determine. But though the difficulty of defining martial law, or, what is much the same thing, of stating when the right of proclaiming it arises, be insuperable, there is, we conceive, little difficulty about explaining generally martial law to consist in the suspension of all other laws, and of the rights springing out of them, and the application of force to the summary execution of whatever measures prudence and foresight, tempered by humanity and natural equity, may dicate as indispensable for the safety of the State, and prevention of anarchy. * * * But the power of declaring martial law cannot, we contend, be properly described as a prerogative of the crown, for that power arises wholly out of an overwhelming necessity impossible to be met and coped with by other means, and for cases of such necessity no rules or system can provide, nor in fact, with such does any jurisprudence pretend to deal."

These quotations and the nature of things alike show, that the right to proclaim martial law, is not a peculiarity of monarchy, a prerogative of a King, but is the prerogative of all governments; and the mere exercise of the right of self-defence and self-preservation, which is as necessary to one form of government as to another.

But we have seen a pretty clear instance of the exercise of martial law by General Jackson, in New Orleans; and as that case was dwelt upon in the argument of Luther *vs.* Borden, and is referred to in the opinion of Mr. Justice Woodbury, who had previously participated in the debates in the Senate on the same subject, it may be well to refer to the facts of that instance of martial law.

General Jackson was in command of Federal troops in a State whose government was loyal to, and a member of the Union. He first proclaimed martial law, and while it was in force, though after the report of peace had reach the United States, the Louisiana Gazette, a newspaper, printed in New Orleans, published a certain article which called from the General a communication denying its truth, which he sent by an aid-de-camp to the offending editor, with a written order requiring its insertion in the next issue of the paper, and concluding as follows:

"Henceforth, it is expected that no publication of the nature of that herein alluded to and censured, will appear in any paper of the city, unless the editor shall have previously ascertained its correctness, and gained permission for its insertion from the proper source."

During this state of things, Frenchmen attempted to elude the General's grasp, under so-called protections from the French consul at New Orleans; and Jackson issued an order requiring all unnaturalized Frenchmen, together with the French consul, to leave New Orleans within three days, and not to return to within one hundred and twenty miles of the city, until the news of the ratification of peace should be officially published. This order was thought by some to be "outside the Constitution," and they protested against it in article in the Louisiana Courier, another newspaper of the city. Thereupon Jackson ordered the editor of that paper to headquarters, and compelled him to disclose the name of the writer, Louallier; and then Jackson sent a file of soldiers to arrest Louallier. Louallier applied to Judge Hall of the United States Court for a writ of habeas corpus.

The officer came to serve it, and Jackson being informed of what had taken place, rushed to meet the officer, seized the writ of habeas corpus from his hand and detained it; and immediatly ordered Judge Hall to be arrested, and he was imprisoned in the same room

with the French expounder of the doctrine that the Constitution provides for all the exigencies of war.

After martial law was withdrawn from New Orleans, Judge Hall called General Jackson to his bar and fined him one thousand dollars for saving New Orleans a little too vigorously from the touch of the invader.

Upon this occasion Jackson delivered a long paper in his defence over his own signature, fully justifying his conduct, which fills eleven columns of Niles' Register, (8 Niles' Register, 245.) One paragraph will give a an idea of the paper:

"A writ of habeas corpus was directed for his (Louallier's) enlargement. The very case which had been foreseen, the very contingency on which martial law was intended to operate, had now occurred. The civil magistrate seemed to think it his duty to enforce the enjoyment of civil rights, although the consequences which have been described would probably result. An unbending sense of what he seemed to think the conduct which his station required, might have induced him to order the liberation of the prisoner. This, under the respondent's sense of duty would have produced a conflict which it was his wish to avoid. No other course remained then, but to enforce the principles which he had laid down as his guide, and to suspend the exercise of this judicial power whenever it interfered with the necessary means of defence. The only effectual way to do this was to place the Judge in a situation in which his interference could not counteract the measures of defence, or give confidence to the mutinous disposition that had shown itself in so alarming a degree. Merely to have disobeyed the writ would have increased the evil, but to have obeyed it was wholly repugnant to the respondent's idea of the public safety and to his own sense of duty. The judge was therefore confined and removed beyond the lines of defence."

Subsequently, and after Gen. Jackson had been President, and had retired to private life, a bill was introduced into Congress to refund the fine, upon the ground that the conduct of Jackson had been perfectly proper; and this led to a debate by most of the statesmen of that day upon the very point now under discussion.

Robert J. Walker, in the Senate, submitted a report upon this subject, in which he said:

"The law which justified this act, was the great law of necessity; it was the law of self-defence. This great law of necessity—of defence of self, of home, and of country—never was designed to be abrogated by any statute, or by any constitution."

Mr. Payne, of Alabama, speaking upon this subject, said:

"I shall not contend that the Constitution or laws of the United States authorize the declaration of martial law by any authority whatever; on the contrary, it is unknown to the Constitution or laws."

And speaking of the argument that if the Constitution did not authorize it, the general ought not to declare martial law, he says:

"Who could tolerate this idea? An Arnold might, but no patriotic American could. It may be asked upon what principle a commander can declare martial law, when it is conceded that the Constitution or laws afford him no authority to do so? I answer, upon that principle of self defence which rises paramount to all written laws; and the justification of the officer who assumes the responsibility of acting upon that principle, must rest upon the necessity of the case."

Mr. Livingston, in a written document submitted by Jackson to the court as a part of his defense, gave his opinion as follows:

"On the nature and effect of the proclamation of martial law by Major General Jackson, my opinion is, that such proclamation is unknown to the Constitution and laws of the United States; that it is to be justified only by the necessities of the case," &c.

The legislatures of several of the States, instructed their Senators, and requested their representatives to vote for the repayment of this fine with costs and interest. The legislature of New York prefaced their resolutions as follows :

"Whereas, the salutary energy of General Jackson at New Orleans, during the campaign of 1814 and 1815, has repeatedly received the approbation of the American people. And, whereas, Congress, on the 15th day of February, 1815, voted thanks to that illustrious citizen for his gallantry at New Orleans, and directed a gold medal to be struck and presented to him in testimony of the high sense entertained by Congress of events so memorable and services so eminent:

Levi Woodbury, equally eminent as a jurist and statesman, speaking in the Senate upon the question whether martial law was properly continued after reports reached Jackson of the ratification of peace, said :

"It would be conceded at once, that this question was not to be argued technically, by special pleading; for technically speaking, there was perhaps no constitutional authority for declaring martial law in the way it had been done. The necessity, the expediency, the moral obligation would be allowed sufficient authority," &c.

While this matter was before Congress, General Jackson wrote a letter to Mr. Linn, which was read by him in the Senate, in which Jackson says :

"It is not the amount of the fine that is important to me; but it is the fact that it was imposed for reasons that were not well founded, and for the exercise of an authority which was necessary to the successful defence of New Orleans. * * In this point of view, it seems to me that the country is interested in the passage of the bill; for exigencies like those which existed at New Orleans may again arise; and a commanding general ought not to be deterred from taking the necessary responsibility from the reflection that it is in the power of a vindictive judge to impair his private fortune, and place a stain upon his character which cannot be removed."

Mr. Douglas made his first great speech in Congrees upon this subject; and General Jackson subsequently, in a personal interview, thanking Mr. Douglas for the complete justification he had made of his conduct, said :

"I never could understand how it was that the performance of a solemn duty to my country—a duty which, if I had neglected, would have made me a traitor in the sight of God and man—could properly be pronounced a violation of the Constitution."

After mature consideration, Congress repaid the fine imposed upon Jackson; and thus vindicated him from all censure for saving his country; and sanctioned in advance, the conduct of any President or commander who, under like necessity, shall take the responsibility of conducting a military compaign with sufficient disregard of the usages of peace, to make it successful.

It was with reference to this exercise of martial law, that this court decided that if a State deems it necessary to declare martial law, this court cannot prevent it.

But is it not a "monstrous exaggeration," to liken this act of March 2, 1867, to a declaration of martial law. The writ of habeas corpus is not suspended in Mississippi; we are now arguing the merits of a cause commenced by that writ. The federal courts are not closed in that State, and every citizen is entitled to appeal to them for all the relief that such courts can afford in any State of the Union. The

civil law is not interfered with by this act in a single particular. If this act were to be repealed to-morrow, what right would McCardle enjoy that he does not now, except the exemption from all control in the commission of crimes? The people have no local government whatever; so Congress has decided, and this court is bound to follow that decision. In this state of things, a military government in the hands of the gallant officers of our army, under the supervision of the Secretary of War and the President, is better than no government; is the best Congress can give them, until it can construct a better one, which it is now engaged in doing. Impossibilities must not be expected from Congress. It cannot speak a government into existence; it must employ the necessary means to accomplish the end, and must have time for these means to be employed. Is it a great stretch of the imagination to suppose that maintaining the public peace is a necessary means, an indispensable condition, to the formation of a civil government? Governments are instituted among men, first of all, to preserve order. Tranquillity is indispensable to the perfect exercise of any of the powers of civil government. But in no case would it seem to be more necessary than when the United States is calling the loyal people of a State to deliberate upon the formation of a State government. And to deny that Congress may preserve order by the only means in its power to employ, is to deny what this court has uniformly decided, that the grant of a power confers all the powers necessary to its exercise, as a part of the grant of the power. The interference of the United States with the local concerns of the State in all such cases, must necessarily be in the military form, until it can establish a civil government. This government cannot go into a federal court and ask for the appointment of a receiver of a State, or of the people of a State. Congress must direct the methods, manner and extent of supervision necessary to accomplish the end, and the laws enacted for that purpose must be administered by military authority *ad interim*, or not be enforced at all. Congress in this case has passed laws, and they are being executed in the only possible way. And if this court can interfere with their execution, it must be upon the ground that it has a constitutional right to restrain the exercise of the constitutional powers of Congress; which is absurd as a legal proposition, and in its practical operation is destructive of all government.

SIXTH POINT.

That, inasmuch as Congress entered upon the prosecution of war against the South in 1861, this court is and will be judicially bound to recognize war as still existing, until Congress shall declare it to be terminated; and that the Acts in question may be defended as an exercise of belligerent rights.

All will concede that, by the Constitution, Congress has the sole power of the government to make war. If Congress may make war, it has the *power* to prosecute it as long as it pleases, answerable only to the people, politically, for an abuse of the power. When war once exists between independent nations, with or without formal decla-

ration, the judicial courts of both governments presume the same state of things to exist, until treaty of peace is concluded. It may be that after a particular battle, the defeat of one party has been so overwhelming, that all the world may believe it can raise no other army, or make further resistance. Yet the state of war exists *de jure*, until treaty of peace be concluded, or the exercise of belligerent rights be totally discontinued.

Puffendorf, book 8, chap. 6, sec. 20, says:

"To give the conqueror a right of propriety that will hold good against the conquered, there must of necessity be a pacification *and agreement* between both the parties, otherwise the right is supposed to continue in the old proprietor, *and whenever he is strong enough* he may justly struggle to recover it."

When a rebellion proceeds so far and assumes such magnitude and importance as to become recognized war, authorizing the government to exercise belligerent rights, (as this court unanimously decided in the prize cases, 2 Black's Reports, was the case with this rebellion,) the government has the right to prosecute the war until the rebellion is not merely checked, but *suppressed and extirpated*. This is the right of every government—no matter what may be its internal structure—whether it be a republic, a monarchy, or an absolute despotism; and it follows that the government is the sole judge of the time when this end, the *extirpation* of rebellion, has been accomplished. Rebels cannot settle the question for themselves. When they have aroused the government, and compelled it to put on its armor, they have invoked a spirit that

"Will not down, at their bidding."

Rebels may say when a war shall begin; the government must say when it shall end. This power belongs to every government; but descending from the general principle to its particular application, to determine what man, or body of men, shall settle this question for a government, we must examine its constitutional structure. In England the King—in the United States the Congress, subject to the veto power of the President—has this exclusive power; because in one case the King, and in the other the Congress, possesses the power of the nation to make war, and that embraces the power to conclude peace. How far a nation may press its advantages against a defeated enemy, or to what extent and with what severity a victorious government may cripple and subdue the power of its rebellious subjects, after war has once commenced, are questions addressed in every country exclusively to the wisdom of the political—the war making—power of the government. And the judicial tribunals are bound to follow, acquiesce in, and enforce the decision of the political power.

Suppose that every judge on this bench had been of opinion that the battle of Antietam had so completely broken the power of the rebellion that further prosecution of the war on the part of the government was unnecessary, and therefore inhuman and wicked; but that Congress, thinking differently, had refused to recall our armies—could this court have interfered? Or could it have decided that war no longer existed? Now change the case, and suppose that every

member of Congress had entertained the same opinion as the judges, and that such had been the fact, and yet Congress had refused to withdraw the army or desist from military operations, is it not manifest that the only difference between the two cases is, that in one Congress would have acted in good faith, and in the other, oppressively and vindictively? Could this court interfere in one case more than the other? In either case Congress would have been exercising an undoubted constitutional power—in one instance properly, in the the other wickedly, exercising it. But if the power to make war is vested in Congress, not in this court, then it is certain that this court cannot declare peace, while Congress is prosecuting war. Such a power in this court, even in cases where Congress was abusing its power to such an extent as to arouse the indignation of the world, would be an *appellate*, *supervisory* power over Congress *in its exclusive sphere*; and there would be an end of the separation and distribution of powers among three co-ordinate departments of the government, which is the corner-stone, the very foundation of the Constitution.

To come to a later day in the history of the war—the surrender of the rebel armies to the army of the Union. Is it not manifest that here, as after the battle of Antietam, it was a matter exclusively within the discretion and *power* of Congress to determine whether military operations should cease—*could be* suspended with safety to the nation; or whether the war should be prosecuted to the reduction of towns, the wasting of private property, or the extermination of the conquered rebels?

Suppose Congress had then directed the army to advance, to slay every man found with arms in his hands or in his house, and to destroy every considerable city in all the rebel States. It will be said this would have been monstrous, devilish. All the nations of the earth would have risen in arms, in the interests of a common humanity, to prevent it. That may be. But could this court have issued an injunction to save any citizen's house in Charleston from destruction? I am discussing a question of power, not the propriety of its exercise. Chatham drew the proper distinction when he said to the Lords: "I admit your *power* to tax the colonies, but I deny the *wisdom* of it."

In the argument of Elphinstone *v.* Bedreechund, in Privy Council, 1 Knapp's Reports, 351, which involved the legality of seizures made after it was claimed the war was at an end; the country conquered and the people made British subjects. The Attorney General, Sir J. Scarlett, said:

"When the success of a commander of an army enables him to take military occupation of a country, he may either deliver it up to the ravages of his soldiery, if he is cruelly disposed; or, may place commissioners in it to preserve tranquility, until final arrangements are made respecting it; and in the latter case it is very advisable to allow the usual courts of justice, that existed in the country before the invasion, to continue their jurisdiction upon such subjects as the commissioners may not think proper to reserve for the consideration of the commander; but this does not deprive that commander of his power, or free the country from military government. In the present case, when the Peishwa had been driven away from Poonah, although that city was taken possession of by the British forces, other places still remained under his dominion, and it was the object therefore of the British commander to cover by a military force the greatest extent of

country he could, and to induce the inhabitants to submit to the British arms. For this purpose Lord Hastings, who was the general-in-chief of the army, as well as vested with the supreme government of India, appointed Mr Elphinstone, a commissioner for the provisional administration of the country during the time that it was occupied by His Majesty's forces. The country was under a military occupation in every sense of the word during the continuance of Mr. Elphinstone's commission, notwithstanding the existence of the ancient tribunals of justice for certain purposes, and the municipal courts at Bombay ought not, therefore, to have entertained any suit of this kind. (For the recovery of property seized by the order of the military.) If it had been the policy of the British government to have accepted the submission of Bajee Row, and to have replaced him on his throne, upon his making such sacrifices of treasure, or such a cession of dominion, as they might have though fit to exact, could it have been contended, that what was done in the interval by the commissioner in the execution of the orders of Lord Hastings, or in the exercise of his discretion, would have been the subject of jurisdiction in the civil courts at Bombay? Had Mr. Elphinstone in pursuance of instructions from the govenor general seized Gokla, or any other chief who was adhering to the Peishwa, can it be held that the chief could have brought an action against him for assault and imprisonment? And yet such conclusions appear inevitable from the premises on the other side."

This was the prevailing argument in the case. The opinion which is very short, is as follows:

Lord Tenterden: "We think the proper character of the transaction was that of hostile seizure made, if not flagrante yet *nondum cessante bello*, regard being had both to the time, the place, and the person; and consequently that the municipal court had no jurisdiction to adjudge upon the subject; but that if anything was done amiss, recourse could only be had to the government for redress. We shall, therefore, recommend it to His Majesty to reverse the judgment."

The fact is, and it is a fact which, in the present temper of Congress and the people, the south would be wise not to press too distinctly upon the public thought, that this government *conquered the south*—conquered its territory, its men, its women and children, and everything that pertained to either. In contempt of the Great Master's solemn warning, "All they that take the sword shall perish with the sword," the south kindled the fires of civil war. In that desperate venture they staked everything—their lives, their property, their civil and constitutional rights. They lost, and were at the mercy of Congress. It was for Congress, not for them, nor for this court, to decide to what extent the chastisement of war, which they had invoked, should be inflicted.

This not being the place to enter into any popular and merely political discussion of the magnanimity or wisdom of the course taken by Congress after the surrender of the rebel armies, it only remains to enquire: *What has Congress done?*

And first: Congress has *not* declared the war to be ended.

After the surrender of the rebel armies, in the spring of 1865, Congress did not meet until December. In the meantime the President had inaugurated measures with a view to the organization of governments, to be readmitted by Congress to full communion as *States* of the Union. Congress apparently awaited the result of the proceedings commenced in that behalf by the President; and had the people of the south complied, in good faith, with the President's proclamations, Congress might have admitted the governments so formed, and thus have settled the whole matter. But such was not the case. It is believed that, in no instance, was the President's plan executed by the people of those States. The persistent and contumacious disregard of the known wishes of the President, might

well be regarded by Congress as evidence of a continuing spirit of rebellion; and that it was not resented by the President himself, proves him to be the most forbearing and patient of men.

Take the case of South Carolina: The President's proclamation, appointing B. F. Perry, provisional governor, before quoted, page 8, required the governor, "at the earliest practicable period, to prescribe such rules and regulations as may be necessary and proper for convening a convention, composed of delegates to be chosen by that portion of the people of said State, who are loyal to the United States, and no others, for the purpose of altering or amending the constitution thereof; and with authority to exercise, within the limits of said State, all the powers necessary and proper to enable such loyal people of the State of South Carolina, to restore said State to its constitutional relations to the federal government, and to present such a republican form of State government as will entitle the State to the guarantee of the United States therefor, and its people to protection by the United States against invasion, insurrection and domestic violence: Provided, that in any election that may be hereafter held for choosing delegates to any State convention, as aforesaid, no person shall be qualified as an elector, or shall be eligible as a member of such convention, unless he shall have previously taken the oath of amnesty, as set forth in the President's proclamation of May 29, A. D. 1865, and is a voter qualified by the constitution and laws of the State of, &c."

After which, Governor Perry commenced his duties, with *official regularity*, by demanding stationery and drawing a quarter's salary in advance, before leaving Washington, which was furnished and paid by the War Department, "*as an expense, incident to the suppression of the rebellion;*" as appears from the following correspondence:

WILLARD'S HOTEL, *July* 21, 1865.

DEAR SIR: I desire to know what provision has been made for defraying the expenses of the provisional government in South Carolina; likewise whether I am allowed a private secretary and his compensation; also as to stationery, blanks, &c.

In your communication to me enclosing my commission, you state that I am to receive a salary of $3,000, and may draw for the same on your department monthly or quarterly. As we have no money in South Carolina at this time, it would be a very great accommodation to me to allow me to draw a quarter salary at this time. If this can be done and you will send me a draft for the same, you will very much oblige me.

I would like to have as full instructions from you as to my duties as you can give. I have already issued my proclamation ordering an election for members of the convention, first Monday in September, and I can assure you that South Carolina will cheerfully *take her position in the Union again as soon as Congress meets*; she will have her senators and representatives there, with her *new constitution* abolishing slavery, giving the election of governor and presidential electors to the people, and abolishing the odious parish representation which has been the cause of all our troubles.

I am, with great respect and esteem, yours truly, &c.,

B. F. PERRY.

Hon. WILLIAM H. SEWARD, *Secretary of State.*

DEPARTMENT OF STATE,
Washington, July 22, 1865.

SIR: I have received your letter of yesterday, and trust that the favorable anticipations which it expresses in regard to the reorganization of the State of South Carolina will be realized.

The inevitable and indispensable charges attending the measure, including your salary as provisional governor, *will be paid by the War Department as an expense incident to the suppression of the rebellion.* You will, consequently, frame and submit to that department an estimate of those expenses, in order that the necessary arrangements for defraying them may be made.

I am, sir, your obedient servant,

WILLIAM H. SEWARD.

His Excellency B. F. PERRY,
Provisional Governor of South Carolina, now in Washington.

Senate Ex. Doc., 1 Sess. 39 Cong. p, 112, 113.

It will thus be seen that the State government which was to be formed by these proceedings was regarded as a means towards the suppression of the rebellion ; in other words, a measure closely resembling the exercise of a belligerent power on the part of this government.

On the 31st of October, 1865, Governor Perry transmitted to the President a copy of the journal of the constitutional convention, and of the constitution it had framed for the State of South Carolina, and afterwards, November 4th, telegraphed to the President certain explanations which have never been communicated to Congress.

On the 6th of November, 1865, Mr. Seward, Secretary of State, telegraphed to Governor Perry, among other things, as follows:

"Your dispatch, to the President, of November 4, has been received. He is not entirely satisfied with the explanations it contains. He deems necessary the passage of adequate ordinances, declaring that all insurrectionary proceedings in the State were unlawful and void ab initio.

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"The objection which you mention to the last clause of the constitutional amendment (of the Constitution of the United States) is regarded as querulous and unreasonable, because that clause is really restraining in its effect, instead of enlarging the powers of Congress. The President considers the acceptance of the amendment by South Carolina as indispensable to a restoration of her relations with the other States of the Union."

On the 10th of November, 1865, the Secretary of State telegraphed to Governor Perry, as follows:

[Telegram.]

His Excellency B. F. PERRY,
Provisional Governor of South Carolina:

WASHINGTON, *November* 10, 1865.

Your letter of the 4th instant is just now received. While much has been done in South Carolina that is conducive to peace and restoration, the President still thinks that it is impossible to anticipate events. He expects, therefore, that you will continue to exercise the duties heretofore devolved upon you as provisional governor of South Carolina, until you shall be relieved by his order. He observes with regret that neither the convention nor the State legislature has pronounced debts and obligations contracted in the name of the State for unconstitutional and even rebellious purposes to be void. He equally regrets that the State seems to decline the congressional amendment of the Constitution of the United States abolishing slavery . I telegraphed to you yesterday on the latter point, as follows: "The President directs me to write to you that an early adoption of the congressional amendment of the Constitution of the United States abolishing slavery by the South Carolina legislature is deemed peculiarly important and especially desirable with reference to the general situation of the Union."

I have now only to say that the President's opinions before expressed remain unchanged.

WILLIAM H. SEWARD

On the 17th of November, 1865, Governor Perry transmitted to the Secretary of State information of the manner, in which South Carolina had complied with "the indispensable condition" to her restoration to the Union, as follows:

GREENVILLE, S. C., *November* 17, 1865.

DEAR SIR: I have the honor of enclosing to you the adoption of the congressional amendment of the federal Constitution, abolishing slavery by the legislature of South Carolina.

I am, with great respect, &c.,

B. F. PERRY.

Hon. W. H. SEWARD,
Secretary of State.

Whereas, the Congress of the United States, by joint resolution approved on the first day of February, Anno Domini 1865, proposed an amendment to the Constitution of the United States for the ratification of the legislatures of the several States, which amendment is in the following words, to wit:

ARTICLE XIII.—Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the limits of the United States or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

1. *Resolved therefore by the senate and house of representatives of the general assembly of the State of South Carolina in general assembly met, and by authority of the same,* That the aforesaid proposed amendment of the Constitution of the United States be, and the same is hereby, accepted, and adopted and ratified by this State.

2. *Resolved,* That a certified copy of the foregoing preamble and resolution be forwarded by his excellency the provisional governor to the President of the United States, and also to the Secrrtary of State of the United States.

3. *Resolved,* That any attempt by Congress towards legislating upon the political status of former slaves, or their civil relations, would be contrary to the Constitution of the United States as it now is, or as it would be altered by the proposed amendment, in conflict with the policy of the President, declared in his amnesty proclamation, and with the restoration of that harmony upon which depend the vital interests of the American Union.

IN THE SENATE, *Columbia, S. C., November* 13, 1865.

I hereby certify that the foregoing is a correct copy of resolutions this day passed by both houses of the general assembly.

WM. E. MARTIN.
Clerk of the Senate.

The words "limits of the" are erroneously inserted in the fifth line of the Article XIII as copied in the above.

WM. E. MARTIN.
Clerk of the Senate.

No more satisfactory evidence could be given of the determination of South Carolina not to comply with the President's demands, or to do so, with such reservations and qualifications as would render her compliance seeming, but not real. The first section of the amendment submitted provides, that slavery shall not exist within the limits of the United States; the second, that Congress shall have power to enforce this provision by adequate legislation. The convention says, that it adopts and ratifies this amendment; but this ratification is accompanied with a reservation, forming indeed a part of the ratification itself, to the effect "that any attempt by Congress towards legislating upon the political status of former slaves, or their civil relations would be" unconstitutional. That is, the convention ratifies and annuls the proposed amendment by the same act.

November 20th, 1865, Mr. Seward telegraphed to Governor Perry, among other things, as follows:

"The President trusts that she (South Carolina) will lose no time

in making an effective organic declaration, disavowing all debts and obligations created or assumed in her name or behalf, in aid of the rebellion. The President awaits further events in South Carolina with deep interest."

The reply to this telegram is one of the grimmest jokes in political history. The convention which had been called by direction of the President, to form a constitution for admission "back into the Union," Governor Perry, the President's agent in this behalf, regards as a pestilential infliction, "a revolutionary body," the immediate dissolution of which is indispensable to the well being of South Carolina. The mournful remonstrance of the President, and his supplicatory appeal to Governor Perry to induce the State legislature to do what ought to have been, but was not, done by his "revolutionary" convention, together with Governor Perry's information to the President that it was both inexpedient and impossible, that the State government was fully organized, and could not be *bothered* with such trifles, is subjoined.

[Telegram.]

"COLUMBIA, *November* 27, 1865.

"Hon. W. H. SEWARD:

"Your telegram of the 20th instant was not received in due time, owing to my absence from Columbia. The convention having been dissolved, it is impracticable to enact any organic law in regard to the war debt. That debt is very small, as the expenditures of South Carolina were re-imbursed by the confederate government. The debt is so mixed up with the ordinary expenses of the State that it cannot be separated. In South Carolina all were guilty of aiding the rebellion, and no one can complain of being taxed to pay the trifling debt incurred by his own account in perfect good faith. The convention did all that the President advised to be done, and I though tit wrong to keep a revolutionary body in existence, and advised their immediate dissolution, which was done. There is now no power in the legislature to repudiate the debt, if it were possible to separate it from the other debts of the State. Even then it would fall on widows and orphans, whose estates were invested in it for safety.

"B. F. PERRY,
"*Provisional Governor.*"

"DEPARTMENT OF STATE,
"*Washington, November* 30, 1865.

"SIR: I have the honor to acknowledge the receipt of your telegram of the 27th instant, informing me that, as the convention had been dissolved, it was impossible to adopt the President's suggestion to repudiate the insurgent debt, and to inform you that, while the objections which you urge to the adoption of that proceeding, are of a serious nature, the President cannot refrain from awaiting with interest an official expression upon that subject from the legislature.

"I have the honor to be, sir,
"Your obedient servant,
"WILLIAM H. SEWARD.

"His Excellency B. F. PERRY,
"*Provisional Governor of the State of South Carolina, Columbia,*"

So too, the people of Georgia notwithstanding the President's proclamation, filled their convention with unpardoned rebels, who were rendered competent to sit by pardons granted by the President, after the convention assembled. The State Department, on the 17th of October, 1865, wrote to James Johnson, Provisional Governor of Georgia, to forward to that department *a list* of the members of the convention who *ought to be pardoned before they could act*. And on

the 25th of October, 1865, the department wrote Governor Johnson thanking him for his prompt compliance with that request.

It is notorious, and matter of history, that the conventions in all the rebel States, were largely composed of unpardoned rebels, and their proceedings in many respects, were such as might have been expected from conventions so constituted, and it is not surprising that Congress did not regard their productions with great favor.

As showing the universal understanding of the public men of the south, as well as of the executive department of this government, that the governments formed in the rebel States must be *admitted* by Congress, and would possess no validity until so admitted, the following correspondence is quoted:

GREENVILLE, S. C., *August* 28, 1865.

MY DEAR SIR: I desire to be instructed as to my duty after the State Convention of South Carolina shall have framed a constitution abolishing slavery and popularizing the organic laws of the State. It is probable that the Convention will provide for the election of members of the legislature and the election of governor by the people on the second Monday in October. When these elections have taken place, is it my duty to convene this new legislature, as provisional governor, or are my functions at an end when the new State government is organized? How long shall I continue to act as provisional governor? *Do my functions continue until the State is admitted back into the Union?*

"As soon as the members of the legislature are elected it will be necessary for them to assemble, in order to provide for the election of members of Congress. Shall the new governor of the State qualify and call the legislature together? If so, can I act any longer as provisional governor? If I do, what are my duties?

"Our governors have always been inaugurated while the legislature was in session. If this continues, it would be proper for me to convene the legislature, and act as governor until the newly elected governor was inaugurated. But even then do my functions cease *before the State is restored to the Union?* And how can the provisional governor and newly elected State governor act together.

"I hope, my dear sir, you will give me full and definite instructions in reference to these matters. Direct your communications to me in Columbia, where my headquarters will be after the 7th of September.

"Yours, truly, &c.,

"B. F. PERRY.

"Hon. WILLIAM H. SEWARD,
"*Secretary of State.*"

"DEPARTMENT OF STATE,
"*Washington, September* 29, 1865.

"SIR: I have had the honor to receive, and I have submitted to the President, your letter of August 28, in which you state:

"'I desire to be instructed as to my duty after the State convention of South Carolina shall have formed a State constitution abolishing slavery and popularizing the organic laws of the State. It is probable that the convention will provide for the election of members of the legislalure and the election of governor by the people on the second Monday in October.'

"And in which you solicit answers to the questions—

"'When these elections have taken place, is it my duty to convene this new legislature, as provisional governor, or are my functions at an end when the new State government is organized? How long shall I continue to act as provisional governor? *Do my functions continue till the State is admitted back into the Union?*'

"In reply, I have the honor to inform you that the President does not think it now necessary to anticipate events. He will expect you to report proceedings and events as they occur in South Carolina, carefully and freely, for the information of this government. *In any case, you will continue to exercise the functions heretofore vested in you by the President until you shall be relieved from that duty by his express orders to that effect.*

"Congratulating you upon the favorable aspect of events in your State, I have the honor to be your obedient servant,

"WILLIAM H. SEWARD.

"His Excellency B. F. PERRY,
"*Provisional Governor of South Carolina, Columbia.*"

[Telegram.]

JACKSON, *Miss.*, *July* 21, 1865.

Hon. W. H. SEWARD, *Secretary of State:*

A negro was murdered by a white man, neither of them belonging to or connected with the army. The crime is punishable, under our law, with death, as any other murder. The accused is in military custody, in Vicksburg. General Slocum refuses to obey a writ of habeas corpus issued by a judge competent to issue, but claims the right to try him by military authority. *If this be triable by military authority, why not all other crimes, and what is the use of civil government?* The record will be sent on.

W. L. SHARKEY,
Provisional Governor.

This presented the question of the nature of these provisional governments very distinctly to the executive mind. The question put by Governor Sharkey sounded the depths of the whole matter. The reply was as follows:

"[Telegram.]

"WASHINGTON, *July* 24, 1865.

"W. L. SHARKEY,
Provisional Governor of Mississippi, Jackson:

"Your telegram of the 21st has been received. The President sees no reason to interfere with General Slocum's proceedings. The government of the State will be provisional only, until the civil authorities shall be restored, *with the approval of Congress.* Meanwhile, military authority cannot be withdrawn.

"WILLIAM H. SEWARD."

Again, after the inauguration of the governor elected under the Presidential government:

"EXECUTIVE OFFICE,
Jackson, Miss., Oct. 19, 1865.

SIR: I have the honor to inform you that Benjamin G. Humphreys, who was elected to the office of Governor of the State, at the late election, has been duly installed into office, and that all the other State officers have been duly qualified. The civil constitutional government of the State is now complete, and the legislature is in session.

Very respectfully, your obedient servant,

W. L. SHARKEY,
Late Provisional Governor."

Replied to as follows:

(Telegram.)

"WASHINGTON, *November* 3, 1865.

Your letter of the 19th ultimo has been received. It is the expectation of the President that you will continue your functions as Provisional Governor until further notice from this department.

WILLIAM H. SEWARD.

His Excellency WILLIAM L. SHARKEY,
Provisional Governor of Mississippi, Jackson."

So matters stood until March 6, 1866, when the President, in compliance with the resolutions of the Senate, of the 5th of January, and 27th of February, 1866, communicated to that house information as to what had been done by him in regard to the construction of governments for the rebel States to be admitted into the Union by Congress. The correspondence above quoted shows conclusively, that, during all the time those governments were in course of forma-

tion, their validity was supposed by the Executive Department to depend entirely upon the subsequent ratification of Congress; and that, in passing upon that question, Congress possessed the right of ultimate judgment upon the whole subject. After receiving this information from the President, Congress entered in earnest upon an investigation of the state of things existing in the south. A joint committee of the two houses was raised to examine into and report upon the condition of the States which formed the so-called Confederate States of America, and to report whether they, or any of them, were entitled to be represented in either House of Congress. This committee examined numerous witnesses, and finally reported to Congress a vast amount of testimony taken by them upon the subject; upon the consideration of which Congress passed the so-called Reconstruction Acts, now in question.

It is to be borne in mind that, from the surrender of Lee and Johnson until the passage of these Acts, the Federal armies had been holding the conquered territory of the south in military possession. This had been done, up to this time, by the Executive Department, in virtue of those acts of Congress which had directed the prosecution of war against the South. It is true that the President, in the meantime, had issued various proclamations declaring the rebellion to be suppressed, and peace to be restored. But if the view hereinbefore taken, that the war power resides exclusively in Congress, subject to the veto of the President, be correct, it follows that these proclamations had no effect to determine the legal existence of a state of war. Congress had never ratified or sanctioned these proclamations. It had passed no act recognizing the existence of a State government in any of the rebel States. Laws had been passed referring to the State of Mississippi, and other States, in the geographical sense. There was no other convenient designation of these localities. And in providing for the exercise of proper federal functions, the different localities intended had been called the State of Virginia, the State of Mississippi, &c. But they were invariably designated as rebel States; and, in point of fact, all such States were then held in military possession.

These reconstruction acts were the first laws passed by Congress after its investigation into the condition of the south. They continue military control over the conquered country, divide it into military districts, direct the President to assign a military commander for each district, not below the rank of a brigadier general, and provide that the commanders, so assigned, shall preserve the peace, punish criminals by military tribunals, permit, when in their discretion it is proper to do so, local courts to act in the premises, and to close those courts when they think proper. These are the powers and duties usually exercised and performed by victorious generals in a conquered country. They evidence conclusively the purpose of Congress to exercise belligerent rights, and a military control, until such time as State governments can be, and shall be, formed under the provisions of those acts to be admitted by Congress into the Union.

It will be observed how very nearly this act conforms to the regulations which existed in India, and under which it was decided by the

privy council, in the case before cited, that no civil court could take jurisdiction over any matter or thing done in pursuance thereof.

In Rose *v.* Himely, 6 Cranch 272, Marshall, C. J., says:

"It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and capable of acting in either character, the manner in which he acts must determine the character of the act. If, as a legislator, he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law and of the proceedings under it, will decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations."

In the same case, Livingston, J., says:

"It was therefore not merely municipal, but belligerent in its nature and object."

See also, Cheriot v. Foussat, 3 Benney 253.
Upton's Maritime War and Prizes, 212.

As before contended, it rested entirely with Congress, the war making power of the government, on the surrender of Lee and Johnson, to determine whether, and to what extent, the war should be thereafter prosecuted against the insurgents. Congress might have directed any degree of severity to be inflicted, which, in its judgment, was necessary to cripple the power of the rebellion, and thus prevent its renewal. Had it *abused* this power, by directing severe measures wholly uncalled for by the condition of the south, and unnecessary to the future peace and welfare of the country, the only remedy would have been an appeal to the people, at the ballot box. This court would have been powerless in the premises. Powerless, not merely in the sense of being unable to enforce its judgments in opposition to the military power of the government; but powerless, by being judicially bound to follow, sustain, and enforce the war policy of the government, without a right to *inquire* into the necessity or justice of such an exercise of that power. Congress, however, actuated by an enlightened and liberal statesmanship, waived the enforcement of such stern remedies as it might have employed; and said, by the acts in question, to the rebel people of the south: "You shall remain under military supervision until you shall show your loyalty, by adopting such forms of civil government as we deem fit to be admitted into the Union. *By your works we shall know you.*" Meanwhile, military supervision was a necessity, and Congress, as in duty bound, ordered its continuance. The wisdom of this policy is not open to discussion in this court. Congress decided upon it, after the fullest examination, and the most mature deliberation. That decision is binding upon this court; and the civil judges cannot *inquire* into its expediency or wisdom. These acts may well be regarded as an exercise of belligerent rights. They establish a military government, to be continued over that conquered people until they shall establish civil governments in the method indicated by Congress. Such temporary government is always an incident of conquest. In the Mexican war our generals established military tribu-

nals to determine private rights; and the judgments of those tribunals between private persons, in territories conquered by our arms, were subsequently to the permanent annexation of such territories to our dominions, sustained and enforced by this Court. Such proceedings are sustained by the courts of all nations. They are an incident to the making of war, and may be even more effectual than the shedding of blood. Winning the good will and confidence of a people by the most perfect administration of justice possible, is an approved method of keeping such people out of the opposing army. And thus the conquest of a country may be secured. It is, where it can be resorted to, not only a commendable, but the most potent means to that end. And in the fearful contest which shook this government for years, Congress in its lawful endeavor to overthrow opposition, was at liberty to employ every and all means, hostile and peaceful, to accomplish its purpose. That was not a loose, unorganized insurrection of individuals. The States wheeled out of the Union, and set their people in martial array against the government. The state of things that followed was war, pure and simple; and the government might employ any and all means—force, or persuasion—might shed blood, or offer rewards—to secure the conquest of that territory, which, although rightfully belonging to our dominions, and in law subject to our authority, was, nevertheless, in fact held and controlled by our enemies.

When the government marched its armies into the rebel States, they went clothed with all the powers of an invading force; and when they established a foothold there, they might, as a part of the war power, do whatever could be done by any invading army. They might give battle to a hostile force; they had a right to establish themselves there as conquerors, with all the rights of conquest, until the war making power should recall them, and proclaim peace to be established.

The right of a conquering power, subduing territory beyond its dominions, to establish military tribunals to adjudicate upon private rights of the conquered people, springs from the fact that such power has no *civil* jurisdiction or authority over such conquered territory. All she can do, therefore, is to administer justice by military tribunals. The law of nations requires no impossibility at the hand of any nation. All that reason or religion requires of any State, or any man, is what is possible under attending circumstances. When a rebellion in Russia or Austria is suppressed by the military power of the government, victory is followed by a restoration of civil authority, which extends to all the wants and necessities of the people. Therefore, in such case, there is no *necessity*, and consequently no *right* to establish military tribunals for civil administration. But a suppressed rebellion in our complicated system, presents an anomalous case. Victory in favor of this government is followed by a restoration of the civil authority of this government. But, unlike the case supposed in Russia or Austria, the civil authority of the United States does not extend beyond the proper subjects of federal jurisdiction.

To the preservation of the peace in a conquered State of this Union, the punishment of ordinary crimes, and the administration of justice between her citizens, the civil authority of this government never did, nor can extend. As regards all those matters—subjects of State jurisdiction—the people of such State are as foreign to this government, and as completely beyond its civil authority as were the people of conquered Mexico; and as to those subjects, the necessity and the right to establish military tribunals is the same in one case as in the other. This distinction between our system of government and one which from a central point reaches all the rights and relations of the people, has been lost sight of in all the discussions of this subject which I have seen, but is sustained and enforced with a clearness and power of reasoning peculiar to himself by Chief Justice Taney, in Ableman *vs.* Booth, 21 How.:

"The powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned."

I am aware that this line of argument is not fashionable. This government, from the first, has held the language of a supplicant to the South. Much that was due to the insulted majesty of the nation was concealed from anxiety to win home deluded brethren. We entered the South with the pretended purpose of looking for our post offices and our forts, our arsenals and our custom-houses property for which we had paid our money, and evidences of our title to which were deposited in our safe. We went in sorrow, not in anger; remonstrating, not threatening; beseeching, not commanding; and as often as we would have gathered her people into our fold, and extended to them our fellowship and protection, they *would not.* Our overtures for peace were met with war, bitter and relentless—war to the knife, and war to the end—until the land was dotted over with fresh-laid graves "on every high hill and beneath every green tree."

Had the conciliatory measures of the government accomplished the purpose without the shedding of blood, that would have been some compensation. Were the rebel States, even now, willing to take their place in the Union under the reasonable regulations provided by Congress, it might be wisdom to forget, as soon as possible, the dreadful past. If instead of this, however, these States come into this court charging oppression and tyranny upon the most indulgent government that ever existed on earth; if, instead of confessing their fault, they come here to contest and wrangle; come here claiming immunity from punishment while resisting and thwarting the purposes of Congress; if they will drive on a discussion of this question, then it must be discussed. And if the result shall tend to remind the people of the North that they have conquered the rebels of the South, and if it shall provoke the government to speak with its sover-

eign voice; if meanwhile reconstruction in the south stands still, and her people have to submit to military rule; if her fair fields remain desolate, her trade and commerce languish, her industry be not employed, or fail of its reward, *she cannot say we did it.*

MATT. H. CARPENTER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

EX PARTE, WILLIAM H. McCARDLE.

SUPPLEMENT TO THE III ART. OF THE FOURTH POINT OF RESPONDENT'S BRIEF.

5. The Constitution provides, Article I, Sec. 8, that Congress shall have power to declare war, and "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," &c.

The Constitution, Article III, Sec. 2, also provides, that "the trial of all crimes, except in cases of impeachment, shall be by jury." &c.

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"SEC. 5. *And be it further enacted*, That every officer, non-commissmissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States, in any of the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial; and such officer shall, moreover, be liable to be cashiered by sentence of a court-martial, and be incapacitated from holding a commission in the militia for a term not exceeding twelve months, at the discretion of the said court; and such non-commissioned officers and privates shall be liable to be imprisoned, by a like sentence, on failure of payment of the fines adjudged against them for one calendar month for every five dollars of such fine.

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These sections of this act provide, therefore, for the trial without a jury of citizens not in the military service of the United States. The State of Pennsylvania, March 28, 1814, by law enacted, "that every non-commissioned officer and private of the militia who shall have neglected or refused to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of the Congress of the United States, passed on the 28th of February, 1795."

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This is an instance applicable to the case on trial, illustrating the general proposition, that where a power is conferred upon Congress, the means to be employed for its execution cannot be restricted by limitations placed by the Constitution upon the means to be employed for the execution of other powers. The Constitution grants to Congress the power to provide for calling for the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

Congress having the power to *call* the militia may make all laws necessary and proper to make the call effectual. There is no limitation in the Constitution as to the laws which may be passed for this purpose. Therefore, the provisions in the Constitution, securing the

right of trial by jury—which are a restriction upon, or regulation of, the exercise of the civil judicial power of the nation—have no application here. And Congress, if it deem it necessary, may provide for punishment, by military tribunals, of those who refuse to obey the call.

To insist that in such cases the recusants were entitled to trial by jury in the civil courts, as for breach of the laws regulating civil administration, would practically put it out of the power of the government to enforce its call; and would be as absurd as the proceedings of the Chief Justice of India, which Burke ridiculed by saying, he had attempted to suppress an insurrection with affidavits.

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